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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 276.

JOSEPH ROSENTHAL, PLAINTIFF IN ERROR,

vs.

PRESTON PLAYER, ASSIGNEE IN BANKRUPTCY OF THOMAS CARNEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED AUGUST 15, 1881.

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a UNITED STATES OF AMERICA.

Circuit Court of the United States for the Fifth Judicial Circuit and Eastern District of Louisiana.

PRESTON PLAYER, ASSIGNEE IN BANKRUPTCY for Thomas Carney,
versus
JOSEPH ROSENTHAL. } No. 8,964.

Joseph P. Hornor and Charles S. Rice, for Joseph Rosenthal, plaintiff in error.

Thomas J. Semmes, Esq., for Preston Player, assignee, &c., defendant in error.

Writ of error returnable to the Supreme Court of the United States, at the city of Washington, D. C., the second Monday of October, A. D. 1881.

1 UNITED STATES OF AMERICA.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

PRESTON PLAYER, ASSIGNEE IN BANKRUPTCY for Thomas Carney,
versus
JOSEPH ROSENTHAL. } No. 8,964.

Petition.—Filed December 30th, 1879.

To the Honorable the Judge of the Circuit Court of the United States for the District of Louisiana.

The petition of Preston Player, who is a citizen of the State of Missouri, and assignee in bankruptcy of Thomas Carney, complains of Joseph Rosenthal, defendant, who is a citizen of the State of Louisiana, and thereupon said complainant states:

That heretofore, to wit, on the twentieth of October, 1875, in the District Court of the United States for the District of Mississippi, John Wooldridge and others, who then and there constituted one-fourth in number and the one-third in value of all the creditors of Thomas Carney, caused proceedings for the ad-
2 judication in bankruptcy of the said Carney to be instituted; that the said Carney was then a resident of, and for six months prior to the institution of said proceedings had been, a resident of the city of St. Louis, within said district; that the said Carney then and there owed debts which exceeded in amount the sum of three hundred dollars, and the aggregate of said petitioner's demands exceeded the sum of two hundred and fifty dollars; that the petition in said proceedings in bankruptcy filed by the petitioning creditors alleged that on or about the twentieth day of July, 1875, the said Carney had made a transfer, sale, and conveyance of his

property at the district aforesaid, with intent to delay, defraud, and hinder his creditors; that on the first day of August, 1875, being a merchant and trader, the said Carney did suspend and did not resume payment of his commercial paper made and passed in the course of his business as such, within a period of forty days, nor at any time thereafter; that in the said proceedings so instituted such further steps were taken that on the 18 March, 1876, at the
3 said Eastern District of Missouri, that the said Thomas Carney became bankrupt before the institution of said proceedings, and he was, therefore, by the order and decree of the said court, then and there declared and adjudged bankrupt accordingly; that afterwards such further steps were taken in said proceedings that the plaintiff only was chosen assignee in bankruptcy of the said Carney; that such choice was by the court duly approved on the 1st of May, 1876, and on the 30th of May, 1876, the register in bankruptcy within said district duly cenveyed unto the plaintiff herein all of the estate, real and personal, of the said bankrupt, all of which proceedings will more fully and at large appear by the record thereof, which is now here to this honorable court exhibited and shown and filed herewith, marked P.

The plaintiff states further, that within three months next before the institution of the said proceedings in bankruptcy, to wit, beginning with the twentieth day of July, 1875, and ending on the 23d August, 1875, at the said city of St. Louis, in said district,
4 the said Thomas Carney, who was then insolvent and in contemplation of insolvency, and who thereby intended to defeat the object and to impair and hinder the operation of the bankrupt laws of the United States, to wit, that portion of the Revised Statutes of the United States included under and within the title bankruptcy, did make unto the defendant certain payments and transfers of sums of money amounting in the aggregate to the sum of thirty thousand dollars, which was then and there the property of him the said Thos. Carney; that at the time of the several payments and transfers aforesaid, and at the time when the said aggregate sum of $30,000 was finally paid by the said bankrupt, the said defendant had reasonable cause to believe him the said bankrupt to be insolvent, and to be acting in contemplation of bankruptcy, and then and there well knew that such payments and transfers and the said payment of said aggregate sum were made with the view, on the part of the said bankrupt, to prevent the said sums and said aggregate sum of money from being distributed under the
5 said bankrupt laws, and the said title of said Revised Statutes, to defeat the object, impair, hinder, and delay the operation and effect, and to evade the provisions of said bankrupt laws and of the said title of the Revised Statutes aforesaid.

The plaintiff states further that heretofore, to wit, on the 22d June, 1875, at the said Eastern District of Missouri, the said Thos. Carney was insolvent and in contemplation of insolvency, and that

the defendant had then and there reasonable cause to believe him, the said Carney, to be so insolvent and in contemplation of insolvency; that with intent to defeat the object of the bankrupt laws of the United States, and with a view to prevent the property first hereinafter described from being distributed under the bankrupt laws, and with a view thereby to impair, impede, and hinder the operation, and to evade the provisions of said bankrupt laws, as the said defendant then and there knew well, that the said Carney did,

6 on the said 22 June, 1875, sell, transfer, and convey unto the said defendant, five hundred cases and parts of cases containing fifty thousand pairs of boots and shoes, property of him, the said Thos. Carney, of the value of forty-five thousand dollars; that afterwards, to wit, that on the 20 July, 1875, and within three months next before the institution of said proceedings in bankrupt aforesaid, the said defendant, the said Carney, for the purpose of further effectuating and carrying out the said fraudulent and unlawful transfer and conveyance of the said property, did agree that the said Carney should have an equal interest in the said goods with the said defendant, and the said defendant did then and there recognize and admit such interest accordingly; that afterwards, to wit, on the 22d July, 1875, the said Thos. Carney, who was then and there insolvent and in contemplation of insolvency, as said defendant then and there had reasonable cause to believe, with intent thereby to defeat the object of the bankrupt laws of the United States, and with a view to prevent the property next

7 hereinafter described from being distributed under the said bankrupt laws, and with a view thereby to impair, impede, and hinder the operation and to evade the provisions of said bankrupt laws, all of which the said defendant then and there well knew, did sell, convey, and transfer unto the said defendant, one hundred barrels of whisky, of the value of seven thousand dollars, one hundred kegs of soda, of the value of five hundred dollars, seventy-five boxes of lye, of the value of four hundred dollars, and three hundred cases of peaches and oysters, of the value of fifteen hundred dollars, in all amounting in value to the sum of nine thousand four hundred dollars, and the said Carney did also agree that the said Carney should retain an interest in the said goods and merchandise last aforesaid equal with that of the said defendant, and the said defendant then and there recognized said interest accordingly; that afterwards, at various times between the said 20 July, 1875, and the 1st March, 1876, the said defendant and the said

8 did sell and convert the said property, said boots and shoes, whiskey, soda, lye, oysters and peaches into cash, and the proceeds of such sale were received by the said defendant, and by him converted to his own use, and by him in no manner accounted for unto this plaintiff, assignee of said Carney, as aforesaid.

The plaintiff states that both the said Carney and the said de-

fendant kept concealed from him, the said plaintiff, the fact of the said payment and transfer of the said aggregate sum of thirty thousand dollars hereinbefore mentioned, and of all the component parts thereof, and also kept concealed from him the fact of the sale, transfer, and conveyance of the said goods and merchandise hereinbefore set forth, and that he, said plaintiff, did not obtain knowledge and information of said matters, or of either of them, until the twenty-ninth day of November, 1879, then, for the first time, the said matters were disclosed to him and brought to his knowledge.

Therefore, in view of the proceedings and in accordance with the statute for such case made and provided, the plaintiff
9 states that an action has accrued unto him to have and demand of said defendant, both the said sum of thirty thousand dollars unlawfully paid unto him as aforesaid, and the said aggregate value of said goods and merchandise so unlawfully appropriated by said defendant as aforesaid, to wit, the sum of fifty-four thousand four hundred dollars, which respective sums amount in the aggregate to eighty-four thousand four hundred dollars.

Wherefore plaintiff prays that defendant be cited, and, after due proceedings, that there be judgment in his favor and against said defendant in the full sum of eighty-four thousand four hundred dollars, with interest from judicial demand and costs, and for general relief.

(Signed) THOS. J. SEMMES,
Attorney for Plff.

Adjudication in Bankruptcy.

EXHIBIT P.

Filed with petition, Dec. 30, 1879.

To the Honorable Samuel Treat, Judge of the District Court of the United States for the Eastern District of Missouri.

The petition of John Wooldridge, trading under the name
10 of John Wooldridge & Co.; James A. Marshall, F. S. Hill and M. W. Messer, copartners trading under the name of F. S. Hill & Co.; John Mendell and Edwin F. Partridge, copartners *co-partners* under the name of John Mendell & Co.; and John S. Fogg, William S. Houghton, and Albert L. Coolidge, copartners trading under the name of Fogg, Houghton & Coolidge, respectfully shows that they are creditors of Thomas Carney, trading under the name of Thos. Carney & Co., who, for a period of six months next preceding the filing this petition, has resided at St. Louis, in the county of St. Louis and State of Missouri, and district aforesaid. That your petitioner's demands are provable against said debtor, the respondent herein, in accordance with the provisions of an act of Congress, entitled "An act to establish a

uniform system of bankruptcy throughout the United States," approved March 2, 1867; that they believe that said debtor, the respondent herein, owes debts to an amount exceeding the sum of three hundred dollars; that the aggregate of your petitioner's demand exceeded two hundred and fifty dollars, and that the nature of your petitioner's demands against the said debtor, re-
11 spondent herein, are as follows and for the consideration stated, to wit:

1. The demand of your petitioner, John Wooldridge, is on notes given him by said debtor amounting to five thousand and sixty-nine dollars and eighty-five cents, exclusive of interest, the consideration being goods sold by said petitioner to said debtor.

2d. The demand of your petitioner, James A. Marshall, is on open account for six hundred and twenty-six dollars, for goods sold and delivered.

3d. The demand of your petitioners, F. S. Hill & Co., is on notes given them by said debtor amounting to fifty-five hundred and nineteen dollars and seventy-five cents, exclusive of interest, the consideration therefor being goods sold by said petitioner to said debtor.

4. The demand of your petitioners, Fogg, Houghton & Coolidge, is on open account for thirteen hundred and eighty-six dollars and seventy cents, for goods sold and delivered.

5. The demand of your petitioners, John Mendell & Co., is on note given them by said debtor for goods sold him, amounting, exclusive of interest, to $1{,}217\frac{60}{100}$ dollars, and also in a judgment in their favor against said Carney for 300 dollars, said judg-
12 ment being rendered before J. C. Cunningham, justice for St. Louis County, October 19, 1875.

And your petitioners further represent that within the six calendar months next preceding the date of this petition said debtor, the respondent herein, did commit an act of bankruptcy within the meaning of said act, to wit:

I. In that said debtor, the respondent herein, did heretofore, to wit, on the first day of August, 1875, being a merchant and trader, suspend and did not resume payment of his commercial paper made and passed in the course of his business as such within a period of forty days, nor at any time thereafter.

II. That said debtor, the respondent herein, within the period aforesaid, to wit, on or about the 20th day of July, A. D. 1875, made a transfer, sale, and conveyance of his property at the district aforesaid, with intent to delay, defraud, and hinder his creditors.

III. That said debtor, within the period aforesaid, at the district aforesaid, and on or about the 24th day of June, A. D. 1875, and at divers other times, being insolvent and in contemplation of insolvency, made a sale, conveyance, and transfer of money
13 and property, with the intent by such disposition of his property to defeat and delay the operation of said bankrupt act.

IV. That said debtor, being a merchant and trader, did, within said period, to wit, on or about August 1, 1875, and at the district aforesaid, fraudulently stop payment of his commercial paper made and passed in the course of his busines as such.

The said petitioners further say that they do constitute one-fourth at least in number and one-third at least in value of all creditors of said respondent, that is to say, that the aggregate of the debts of said petitioners, provable under said act of Congress against said respondent, amounts to at least one-third of the debts so provable.

Wherefore your petitioners pray that said Thomas Carney may be declared bankrupt, and that a warrant may be issued to take possession of his estate, that the same may be distributed according to law.

And that such further proceedings may be had thereon as the law in such case prescribes.

JOHN WOOLDRIDGE & CO.,
14 By HITCHCOCK, LUBKE & PLAYER, *Attys.*
JAMES A. MARSHALL,
By D. W. PAUL, *his Attorney.*
F. S. HILL, }
M. W. MESSER, }
Copartners as F. S. Hill & Co.,
By E. B. ADAMS, *their ag't and atty.*
JOHN MENDELL, }
EDWIN F. PARTRIDGE, }
Copartners as John Mendell & Co.,
By JACOB KLEIN, *agent and att'y.*
FOGG, HOUGHTON & COOLIDGE,
By JOHN D. DAVIS, *their atty.*
Petitioners.
HITCHCOCK, LUBKE & PLAYER,
Att'ys for Petitioning Creditors.

UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF MISSOURI, } *ss.*

We, Preston Player, Daniel W. Paul, Elmyr B. Adams, Jacob Klein, and John D. Davis, agents and attorneys of the petitioners above named, for whom respectively we have signed, do hereby make solem oath that the statements contained in the foregoing petition subscribed by us for and in the names of said petitioners are true, so far as the same are stated of our knowledge, and that those matters which are stated therein on information and belief
15 are true according to the best of our knowledge, information, and belief, the said 2d, 3d, and 4th grounds of bankruptcy above charged being stated on infermation and belief.

Deponents further say that their respective principals reside out of and beyond the said eastern district of Missouri, and that the

verifications of said respective principals cannot be had to this petition in time, and defendants further say that they have been employed to collect of said respondent, Thomas Carney, the respective claims of said principals against said Carney hereinbefore mentioned, and as such agents and attorneys, they, said deponents, have charge of said respective claims, and have investigated the same, and thus acquired the knowledge as to the matters in the foregoing petition charged by them respectively.

D. W. PAUL.
ELMYR B. ADAMS.
JACOB KLEIN.
PRESTON PLAYER.

Sworn to and subscribed before me this 20 day of October, A. D. 1875.

D. D. DUNCAN,
U. S. Comm. E. D. Mo.

16 Jno. D. Davis subscribed and sworn to before me, this 20 day of October, A. D. 1875.

F. A. WERNER,
Comm'r U. S. Circuit Court,
Eastern District of Missouri.

(Endorsed :) Case No. 1,333. District Court of the United States Eastern District of Missouri. In bankruptcy. In the matter of Thomas Carney, debtor. Petition by creditors. Hitchcock, Lubke & Player, att'ys for petitioners. Filed 8 o'clock and 30 minutes P. M., this 20th day of October, 1875. Joseph H. Clark, clerk.

In the District Court of the United States for the Eastern District of Missouri.

IN THE MATTER OF THOMAS CARNEY, BANKRUPT. } No. 1,333. In Bankruptcy

Adjudication.

At St. Louis in said district.

SATURDAY, 18 *March, A. D.* 1876.

This day comes the petitioning creditors herein, by Messrs. Hitchcock, Lubke & Player, their attorneys, and also comes said
17 Thomas Carney, by Amos M. Thayer, Esquire, his attorney, and this being the day appointed by the court for the hearing of said matter, said matter was heard upon the petition for adjudication in bankruptcy herein and answer thereto, and said answer admitting the first act of bankruptcy alleged in said petition, and the court having considered the report herein filed by Lucien Eaton, Esquire, setting forth that the requisite amount in number and

value of the creditors of said estate, as required by the amended bankrupt act of June 22d, 1874, have joined in said petition, it is, therefore, adjudged that said Thomas Carney became bankrupt, within the true intent and meaning of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, before the filing of said petition, and he is, therefere, declared and adjudged bankrupt accordingly.

And it is ordered that said bankrupt shall, within five days after the date of this order, make and deliver or transmit by mail, post-paid, to the marshal of said district, as messenger, a schedule
18 of his creditors and an inventory of his estate in the form and verified in the manner required of the petitioning debtor by said act.

It is further ordered that said bankrupt attend before Lucien Eaton, Esquire, one of the registers in bankruptcy of this court, at his office, No. 203 Pine street, St. Louis, district aforesaid, on Thursday, the thirteenth day of March, A. D. 1876, at 11 o'clock A. M. of that day, and thenceforth, as said register may direct, to submit to such orders as may be made by said register or by this court relating to said bankruptcy; and this case is hereby referred to said register to take such further proceedings therein as are by law required.

And it is further ordered that the marshal report his proceedings, under this order, to said register, on or before said 30th day of March, A. D. 1876, at 11 o'clock A. M., and thereupon the first meeting of creditors shall be held on a day to be set therefor by said register at his office.

In the District Court of the United States for the Eastern District of Missouri.

IN THE MATTER OF THOMAS CARNEY, BANKRUPT. } No. 1,333. In bankruptcy.

19 Order of approval of assignee, at St. Louis, in said district Monday, 1st May, A. D. 1876.

Upon presentation of the certified memorandum of the first meeting of creditors herein, and upon consideration thereof—

It is ordered by the court that the election therein reported of Preston Player as assignee of the estate and effects of said bankrupt be, and the same is hereby, approved.

Assignment of Bankrupt's Effects.

In the District Court of the United States for the Eastern District of Missouri.

IN THE MATTER OF THOMAS CARNEY, BANKRUPT. } In Bankruptcy.

Before Lucien Eaton, Register in Bankruptcy.

EASTERN DISTRICT OF MISSOURI, *ss:*

Know all men by these presents, that Preston Player, of St. Louis, in the County of Saint Louis and State of Missouri, has been duly appointed assignee in said matter.

Now, therefore, I, Lucien Eaton, register in bankruptcy of said district, by virtue of the authority vested in me by the 14 section of an act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved
20 March the second, 1867, and the amendments thereof, there being no opposing interest, do hereby convey and assign to said Preston Player, assignee as aforesaid, all the estate, real and personal, of the said Thomas Carney, Bankrupt, aforesaid, including all the property, of whatever kind, of which he was possessed or in which he was interested or entitled to have on the twentieth day of October, 1875, with all his deeds, books and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said 14th section of said act.

To have and to hold all the foregoing premises to the said Preston Player and his heirs. In trust, nevertheless, for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

In witness whereof, I, the said register, have hereunto set my hand and caused the seal of said court to be affixed, this third day of May, 1876.

[SEAL.] (Signed) LUCIEN EATON,
Register in Bankruptcy.

(Endorsed :) Case No. 1,333. District Court of the United
21 States, Eastern District of Missouri. In bankruptcy. In the matter of Thomas Carney, bankrupt. Assignment, made the 3d day of May, 1876, by Lucien Eaton, register. Returned into court and filed this 6th day of May, A. D. 1876, at 11 o'clock A. M. Joseph H. Clark, clerk.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF MISSOURI, } *ss.*

I, Joseph H. Clark, clerk of the District Court of the United States in and for the Eastern District of Missouri, do hereby certify the writing hereto annexed to be a true copy of the creditor's petition for adjudication of bankruptcy, the order of adjudication made by said court on the 18th day of March, A. D. 1876, the order of approval of assignee made by said court on the 1st day of May, 1878, and the deed of assignment in the matter of Thomas Carney, bankrupt in bankruptcy, as fully as the same remain on file and of record in said matter in my office.

22 In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis,

in said district, this 18th day of December, in the year of our Lord eighteen hundred and seventy-nine.

[SEAL.] (Signed) JOSEPH H. CLARK,
Clerk of said Court.
By WM. MORGAN, *Dep'ty.*

Citation.—Issued Dec'r 29th, 1879.

UNITED STATES OF AMERICA,
DISTRICT OF LOUISIANA.

PRESTON PLAYER, ASSIGNEE IN BANKRUPTCY for Thos. Carney,
vs.
JOSEPH ROSENTHAL. } No. 8964.

Circuit Court of the United States, Fifth Circuit, District of Louisiana

To Joseph Rosenthal:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of
23 the Circuit Court of the United States, Fifth Circuit and District of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place were the court is held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 29th day of December, A. D. one thousand eight hundred and seventy-nine, and of the Independence of the United States of America the 104th year.

[SEAL] Teste: (Signed) T. V. COUPLAND,
D'y Clerk.

Marshal's Return.

Received Dec. 30, 1879, by the U. S. marshal, and on the same day, month, and year I served a copy of the within citation and the accompanying petition on Joseph Rosenthal, defendant, and the person herein named, by delivering the same to him in person at his domicil, No. 241 Bar[illegible]ne st., city of New Orleans.

(Signed E. S. CURRY,
24 *D'y U. S. Marshal.*

Exception.—Filed Jan'y 20th, 1880.

PRESTON PLAYER, ASSIGNEE IN BANKRUPTCY for Thos. Carney,
vs.
JOSEPH ROSENTHAL. } No. 8964. U. S. Circuit Court.

Now comes Joseph Rosenthal, defendant, and in all respects reserving and in nowise waiving the right to further plead or to answer herein in case this exception be overruled, for exception to plaintiff's action shows:

1st. That, as appears from plaintiff's petition, suit has not been brought within two years from the time when the pretended causes of action accrued, if the same accrued at all, for said assignee, plaintiff, and the said suit is not maintainable.

2d. That the sale, transfer, and conveyance of five hundred cases and parts of cases of boots and shoes alleged and pretended in said petition to have been made by said bankrupt to this exceptor on the 22d day of June, 1875, was not, if made at all, made
25 within three months before the filing of the petition against the said bankrupt as appears on the face of plaintiff's petition, and the demand in said petition in respect to said alleged and pretended sale, transfer, and conveyance is not maintainable.

Wherefore this exceptor prays that this exception be maintained and that plaintiff's suit be dismissed with cost, and that he have all general relief.

(Signed) CHAS. S. RICE,
Of Counsel.

Submission of Exception.

Extract from the Minutes, November Term, 1879.

NEW ORLEANS, *Saturday, February* 14, 1880.

Court met pursuant to adjournment. Present, Hon. E. C. Billings, district judge.

PRESTON PLAYER, ASSIGNEE, &c., *vs.* JOSEPH ROSENTHAL. } No. 8,964.

This cause came on to be heard on the exception herein filed by the defendant, and having been argued by counsel for the parties respectively, the court took time to consider.

26 *Order as to Exception.*

Extract from Minutes of February 25th, 1880.

PRESTON PLAYER, ASSIGNEE, *vs.* JOSEPH ROSENTHAL. } No. 8,964.

This cause having been submitted upon the exceptions filed by the defendant, for the reasons orally assigned in open court, the law being considered, it is ordered, adjudged, and decreed that as to the first ground of said exception the same be dismissed; that as to the second ground of said exception, the said exception be dis-

missed so as not to prejudice the right of plaintiff to prove any of the transactions alleged in said petition to have taken place on the 20 day of July, 1875, and within three months next before the institution of proceedings in bankruptcy against the bankrupt, Thomas Carney, and maintaining said ground of exception only so far as relates to the transfer and sale of five hundred cases of boots and shoes, alleged to have been made on the 22d day of June, 1875. But the plaintiff shall have the right to prove, as
27 by him alleged, that subsequently to 22d June, 1875, the bankrupt, by agreement with defendant, was reinvested with an interest in said goods, and thereafter, within three months, the goods were disposed of as alleged.

Answer.

Filed March 3d, 1880.

U. S. Circuit Court for the Dist. of La.

PRESTON PLAYER, ASSIGNEE, *vs.* JOSEPH ROSENTHAL. } No. 8,964,

Now comes the defendant and, reserving all rights under his exceptions filed herein, for an answer to plaintiff's petition denies all and singular the allegations therein contained.

And prays to be hence dismissed, with costs, and for all general relief.

(Signed) CHAS. S. RICE, *of Counsel.*

Supplemental Answer.

Filed Decr. 7th, 1880.

U. S. Cir. Court.

PRESTON PLAYER, ASSIGNEE, *vs.* THOMAS CARNEY. } No. 8,964.

28 Now comes defendant and pleads the prescription of two years, as provided for in the bankrupt act, sec. ——, of the Revised Statetes of the United States, in bar of plaintiff's action.

Struck out by order of court on trial.

And for supplemental answer to petition of plaintiff defendant special denies that the matters and things alleged in plaintiff's petition were first disclosed to him on November 29, 1879, as alleged, but avers that said plaintiff had full knowledge of all the transactions that ever took place between defendant and Carney, bankrupt, at the time said pl'ff was elected assignee.

Wherefore, without waiver of any part of the answer heretofore filed herein, but specially reserving all rights thereto, defendant

prays that this supplemental petition be filed, and that plaintiff's suit be dismissed, with costs, and for all general relief.

(Signed) CHAS. S. RICE,
JOS. P. HORNOR,
Of Counsel.

Order.

Let this supplemental petition be filed.
New Orleans, Dec. 7, 1880.

(Signed) EDWARD C. BILLINGS, *Judge.*

29 *Hearing and Continuance.*

Extract from the minutes of December 14th, 1880.

PRESTON PLAYER, ASSIGNEE, *vs.* JOSEPH ROSENTHAL. } 8964.

This cause came on this day to be further heard, and the said counsel of the respective parties, as well as the said jurors in the cause, being all present, the trial proceeded with. And, after hearing the arguments of Chs. S. Rice and Joseph P. Hornor on behalf of the defendant, the cause was continued till to-morrow at 9.30 A. M.

Verdict.

Extract from the minutes of December 15th, 1880.

PRESTON PLAYER, ASSIGNEE, *vs.* JOSEPH ROSENTHAL. } 8964.

The court resumed the trial of this cause from yesterday, and the said counsel of the respective parties, as well as the jurors empaneled in the cause, being all present, the trial was pro-
30 ceeded with. And, after hearing further argument on behalf of the defendant by Joseph P. Hornor, and the closing argument on behalf of the plaintiff by Thomas J. Semmes, and receiving a charge from the court, the cause was submitted to the jury, who thereupon retired to consider on their verdict. After due deliberation the said jury returned into court, and then and there, through its said foreman, rendered and delivered the following verdict, to wit:

NEW ORLEAS, *Dec'r* 15, 1880.

We, the jury, find for plaintiff the sum of seventeen thousand five hundred dollars, with interest from judicial demand.

B. G. BARTON, *Foreman.*

Whereupon it was ordered that said verdict be recorded, and it is done accordingly.

Motion and Order for time to file Bills of Exception.

Extract from minutes of December 15th, 1880.

PRESTON PLAYER, ASSIGNEE, vs. JOSEPH ROSENTHAL. } No. 8964.

31 Upon motion in that behalf by counsel for the defendant, ordered that they have ten days to prepare and present their bills of exceptions herein.

Judgment.

Extract from judgment book, November term, 1880.

NEW ORLEANS, *Wednesday, December* 15, 1880.

Court met pursuant to adjournment. Present, Hon. Edward C. Billings, district judge.

PRESTON PLAYER, ASSIGNEE, vs. JOSEPH ROSENTHAL. } 8964.

By reason of the verdict of the jury herein, and in accordance therewith, it is ordered, adjudged, and decreed, that the plaintiff, Preston Player, assignee in bankruptcy of Thomas Carney, do have and recover of the defendant, Joseph Rosenthal, the sum of seventeen thousand five hundred dollars, with five per cent. interest per annum from the 30th December, 1879, until paid, and costs of suit.

Judgment rendered December 15th, 1880.

Judgment signed January 19th, 1881.

(Signed) EDWARD C. BILLINGS, *Judge.*

32 *Bill of Exception No. One.*

Filed January 17th, 1881.

U. S. Circuit Court, District of La.

PRESTON PLAYER, ASS'EE, vs. JOSEPH ROSENTHAL. } No. 8964.

Be it remembered, that, on the trial of this case in open court, on Tuesday, 7 December, 1880, before the pleadings were read, counsel for the defendant filed the following plea and supplemental answer:

"Now comes the defendant and pleads the prescription of two years, as provided for in the bankruptcy act, sec. , of the Revised Statutes of the United States, in bar of plaintiff's action.

"And for supplemental answer to petition of plaintiff, defendant specially denies that the matters and things alleged in plaintiff's petition were first disclosed to him on November 29, 1879, as alleged; but avers that said plaintiff had full knowledge of all transactions that ever took place between defendant and Carney, bankrupt, at the time said plaintiff was elected assignee."

Whereupon counsel for plaintiff objected, and moved to
33 strike out the second paragraph of the aforesaid plea and answer, commencing "And for supplemental answer," &c., on the ground that the same was an amendment of the original pleadings of the defendant, and came too late. And the court maintained said objection, and ordered said paragraph to be stricken out, and the said plea and supplemental answer was then, as so amended, allowed to be filed, to which ruling of the court counsel for defendant excepted, and tendered this, their bill of exceptions, and prayed that the same may be filed and made a part of the record of this case, which is now accordingly done.

Addition by counsel for plff.

That during the trial of the cause no restraint was put upon the defendant in offering evidence as to the knowledge of pl'ff as alleged in that part of the supplemental answer which was stricken out, and both sides offered evidence as to such knowledge, and the court, upon this point, left it to the jury to say whether the action was commenced within two years from the time when the plaintiff knew, or by due diligence might have known, of the cause of action.

(Signed) EDWARD C. BILLINGS, *Judge.*

34 *Bill of Exceptions No. Two.*

Filed January 17th, 1881.

U. S. Circuit Court, District of Louisiana.

PRESTON PLAYER
vs.
JOSEPH ROSENTHAL.

Be it remembered that on the trial of this case, in open court, on Tuesday, 7th December, 1881, counsel for plaintiff offered in evidence the depositions of Louis Temme, John Senour, Carl Hirsch, Fred Lipphardt, and Amos M. Thayer, and the several documents annexed to said depositions, which had been taken in St. Louis under commission, all of which are hereto annexed and made part of this bill of exceptions.

To all of which counsel for defendant objected on the following grounds, viz:

That in *limine litis* defendant had filed an exception to the petition of plaintiff in the nature of a demurrer pleading:

"1. That, as appears from plaintiff's petition, suit has not been brought within two years from the time when the pretended causes of action accrued, if the same accrued at all, for said assignee, plaintiff, and the said suit is not maintainable.

35 "2d. That the sale, transfer, and conveyance of five hundred cases and parts of cases of boots and shoes alleged and pretended in said petition to have been made by said bankrupt to this exceptor, on the 22d day of June, 1875, was not, if made at all, made within three months before the filing of the petition against the said bankrupt, as appears on the face of plaintiff's petition, and the demand in said petition, in respect to said alleged and pretended sale, transfer, and conveyance, is not maintainable."

And said exception having come on for trial and having been argued by counsel for both parties, the court, on the 25 day of February, 1880, made thereupon the following order, viz:

"This cause having been submitted upon the exceptions filed by the defendant, for the reason, orally assigned in open court, the law being considered, it is ordered, adjudged, and decreed that as to the first ground of said exception the same be dismissed; that as to the second ground of said exception, the said exception be dismissed so as not to prejudice the right of plaintiff to prove

36 any of the transactions alleged in said petition to have taken place on the 20 day of July, 1875, and within three months next before the institution of proceedings in bankruptcy against the bankrupt, Thomas Carney, (Oct. 30, 1875), and maintaining said ground of exception duly, so far as relates to the transfer and sale of five hundred cases of boots and shoes alleged to have been made on the 22d day of June, 1875, but the plaintiff shall have the right to prove, as by him alleged, that subsequently to the 22d of June, 1875, the bankrupt, by agreement with defendant, was reinvested with an interest in said goods and thereafter, within the three months, the goods were disposed of as alleged."

That inasmuch as all of the depositions related only to the sale of five hundred cases of boots and shoes alleged to have been made on 22d June, 1875, as appears by the inspection of said depositions, which, by the above ruling of the court, had been dismissed as being improperly brought in plff's action, said depositions were inadmissible and were irrelevant to the cause of action before the jury, and calculated to mislead them.

37 But the court overruled these objections, and admitted said depositions in evidence and allowed them to be read to the jury, to which ruling counsel for defendant excepted and tend-

ered this their bill of exceptions and pray that the same may be filed and made a part of the record, which is accordingly done.

Addition by Counsel for Pl'ff.

The court, in overruling the objections, stated that the facts and circumstances surrounding the case should be submitted to the jury, and the facts of the sale on 22d June, 1875, and its circumstances were allowed to be proved on the representation of counsel that said evidence was to be followed up by testimony showing a subsequent investment of an interest in said goods in the bankrupt, by agreement with defendant.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of Exceptions No. Three.

Filed January 17th, 1881.

U. S. Circuit Court, District of Louisiana.

PRESTON PLAYER, ASSIGNEE,
vs.
JOSEPH ROSENTHAL. } No. 8964.

Be it remembered, that on the trial of this case in open
38 court, on Wednesday, the 8th day of December, 1880, Thomas Carney, a witness for the plaintiff, being upon the stand and having testified, that while he was in St. Louis and the defendant was in New Orleans, several letters had been sent and received by each to the other, and having produced certain letters purporting to have been addressed by the defendant to the witness, and which witness testified he had received through the mails, and which were offered in evidence and read to the jury, the witness then produced certain letter-press copies of letters which he testified that he had written in St. Louis and addressed to the defendant in New Orleans, and had mailed with his own hands in the post-office at St. Louis, addressed to the proper address of defendant at New Orleans, postage prepaid, whereupon counsel for plaintiff offered said letter-press copies of letters in evidence, which are as follows:

Document U.—Filed Dec'r 8th, 1880, and made part of foregoing Bill of Exceptions.

FEBRUARY 4, '6.

JOSEPH ROSENTHAL, ESQ.

39 DEAR SIR: I respectfully notify you that I shall withdraw from my business connection with you, in accordance with the agreement I hold signed by you, for the following reasons: First. I find it impossible for us to get along with Myer in a manner satisfactory or safe to my interest as I consider it. I gave him last spring

10,355.45 of my notes for his own use and benefit temporarily in this way, he agreeing to pay me whatever I might pay for them. He has sold those notes and realized on them long ago, and now utterly refuses to give me a written memorandum of the agreement, but says I have got to take his word. I have paid 2,283.70 of those notes over two months ago, and have not received one cent from him as yet for them, notwithstanding his oft-repeated promise to pay me as fast as I paid those notes.

Second. Situated as I am, with no voice or authority to do anything other than a boy, porter, or bill clerk has in your house, I cannot be of half the service to you or myself that I could if differently situated.

Third. I have resolved to settle with my debt'r, get out of my embarrassment—shall require my means to so with as soon as possible.

40 Fourth. I cannot afford to peril all I have with any man upon his simple word at my time of life. My experience is against that kind of business, for I have always found people who meant what they said to be willing to write it; I have always done so, and shall not depart from that rule. Death is liable to occur to all, and I cannot afford to risk my all upon so slender a thread. There are many other reasons I might add, but will simply close by saying:

I shall terminate my agreement with you in accordance with the terms expressed in it. Shall expect what may be my due paid me at that time, to wit, 90 days from this date.

Please acknowledge receipt of this and very much oblige.

I entertain for you the highest sentiment of respects and confidence, fully believing that you and I will have no misunderstanding in all matters which have passed between us.

Very respectfully,

THOS. CARNEY.

41 P. S.—One word more. I am charged on your books with 543.24, which was made by Fred. Lipphardt at the time you and I closed our settlement, and you gave a memorandum of the amount the books showed. I remember it well, after you and I had settled. You asked Mr. Lipphardt how my acc. stood.

He made up a statement, which you and I knew, as I supposed, to be ficticious, and I remarked to you that I could not pay it then in his presence, but told you I would give you the factory's stock to secure it, which I did, and supposed you understood it as I did—that it was simply done as stated.

Fred. For if I remember anything, it is that I did not owe you anything at that time, and did not show to the contrary, until the other day when Myer presented me with the amount for payment.

I gave you a slip of paper at the time, with all the amounts on that I paid you, and had one myself—but I carried it in my pockets until it has been worn out. Have you got the one I gave you?

If so, please send me a copy of it, so that I can trace up and
42 show Myer the error. I have asked him fully a half-dozen times to see the cancelled notes I surrendered to you, so as to try to make up the acc. over again as I had it on the mem. I had, of which I gave you a copy, but he refuses to give it to me, or to give me any satisfaction about the matter, so that I am compelled to ask this favor of you. If I owe you the money I want to pay it at once, and should have done long ago if I had supposed I did. Myer has already retained more than enough of my money to pay it, and I want the matter settled one way or the other. I am very sorry to have to trouble you with this matter and would not do so if I could get what I need elsewhere. I have the memorandum you gave me as from the books, what I want is a copy of the memorandum I gave you of my payments to you from time to time.

Your friend,

THOS. CARNEY.

Document V.—Filed Dec'r 8, 1880, *and made part of foregoing Bill of Exceptions.*

43 "*March* 10, '70.

JOSEPH ROSENTHAL, ESQ.,

Dear Sir: Did you receive my letter of Feb'y 4? I have had no reply from you.

I would like to know what your recollections are concerning the charge of $543.24 on your books, after you and I had settled, for I have lost the memorandum that we settled by. I gave you a copy of it. Have you got it? I would like to have the matter arranged while it is fresh in my recollection.

Business this week has been very good. We have had a very good sale on Tuesday and Thursday. Wednesday's sale did not amount to much.

I sold some bone meal and bone black while East, though not as much as I should have liked to have done. The market seems to be full of bone black, and meal is more generally used in the fall.

Hope to hear from you soon. I am, as ever,

Your friend,

THOS. CARNEY.

44 *Document marked W.—Filed Dec'r* 8, 1880, *and made part of foregoing Bill of Exceptions.*

"NEW ORLEANS, *Sept.* 16, '75.

MR. THOS, CARNEY, St. Louis.

Dear Sir: I beg to be excused for not answering your last letter sooner, on account of my being a little busy to date. I think you have done well in disposing of the bone black @ 2⅝, as we are in need of money; after we are out of debt and have a surplus on

hand to work with, we can be more independent; and with the improvement of trade, we can raise our figures again. I am pleased to hear that my business is going on smoothly, and that Isaac and Mayer are carrying out my instructions. I shall be pleased to hear from you, from time to time, in regard to business there. The canned fruit I bought for Cal. Hirsch I have closed out at a loss. If you wish to see the account of sales you can find it at my office there. I have sent it to Meyer to be handed over to Mr. Hirsch—the lot sold for $814 $\frac{00}{100}$.

Very truly,

45 J. ROSENTHAL.

Document marked W.—Filed Dec. 8, 1880, *and made part of foregoing Bill of Exceptions.*

NEW ORLEANS, *March* 18, '76.

Mr. THOS. CARNEY, *St. Louis, Mo.*

DEAR SIR: Yours of the 10th inst. is at hand, also your favor of last month. But owing to an accident in injuring my foot in stepping out of a car, which laid me up for about a month, and since my recovery being very busy in making some repairs upon some property, I should have been up there to answer your letter in person. I don't recollect of having taken a memorandum of the settlement. But I recollected what the settlement was. I expect to be in St. Louis in May, when I will explain all to you to your satitfaction.

Very truly,

J. ROSENTHAL.

46 *Document marked X.—Filed Dec.* 8, 1880, *and made part of foregoing Bill of Exceptions.*

JOSEPH ROSENTHAL, ESQ. "JULY 17, '76.

DEAR SIR: I hereby enter my protest against the pretended sale to M. Stern & Co. (as I did verbally when you first told me of) of the merchandise, store fixtures, notes, and accounts, and forbid the delivery of the same under any pretext whatever.

All goods which have been sold since the taking account of stock must go to the benefit of the old firm of Joseph Rosenthal until such time as a satisfactory sale and settlement shall be made.

Respectfully yours,

THOS. CARNEY, *Agt.*

Document marked Y.—Filed Dec. 8, 1880, *and made part of foregoing Bill of Exceptions.*

"NOV. 18, '6.

JOSEPH ROSENTHAL, ESQ., *New Orleans, La.*

DEAR SIR: I have this day received the notes of the F.
47 and C. Works at their face value last July, to wit, 7,373 $\frac{25}{100}$ and twenty thousand dollars of stock at the rate of 40

p. c. on the dollar, for the accounts of Thos. R. A. Carney, as agreed between you and I last July when here and surrendered to your agent here (Mayer Stern) your receipt for twenty-five thousand dollars, and I did so, relying implicitly upon your verbal promise, that if I would do so you would show me the books and make a fair settlement thereafter, and pay whatever balance there is due the owner of the certificate. This matter has been delayed much longer than either you or I anticipated, but such delay could not be avoided. I trust that your own business concerns have been more fortunate than mine have been for the past few years; if not, I can only condole with you and wish you better luck in the future.

Sincerely yours,

THOS. CARNEY."

But counsel for defendant objected to the introduction of said letter-press copies of letters in evidence, on the ground: 1st.
48 That plaintiff had called upon defendant to produce the originals of said letters by a *subpoena duces tecum*, to which defendant had made a regular return under oath, in which said defendant swore that he had never received the originals of said copies; and 2d, because there was no evidence whatever offered to the jury that defendant had ever received such letters, and that said copies of said letters were not admissible against the defendant until defendant had been proved to have received the original thereof.

But the court overruled these objections, ruled that the foregoing evidence having been offered, the question of the receipt of the letters was for the jury, and allowed said copies to be received in evidence and read to the jury, to which ruling counsel for defendant excepted, and tendered this their bill of exceptions, and prayed same be signed and made a part of the record, which is that the accordingly done.

(Signed) EDWARD C. BILLINGS, *Judge.*

49 *Bill of Exceptions No. Four.*

Filed January 17th, 1881.

PRESTON PLAYER, ASSIGNEE, *vs.* JOSEPH ROSENTHAL. } No. 8,964.

U. S. Cir. Ct., Dist. of La.

Be it remembered that on the trial of this case, in open court, the plaintiff, being sworn as a witness in his own behalf, admitted that he was a member of the bar of St. Louis; had been duly elected assignee of the bankrupt, Thomas Carney; had been one of the solicitors of the prosecuting creditors; also had forced said Carney into bankruptcy, and that, in pursuance of his right as assignee,

he had, in May, 1876, subjected said bankrupt to an examination, pursuant to the provisions of the bankrupt act, at which said bankrupt, after having testified at great length, finally refused to answer any further questions relating to his property or affairs, on the ground that his answers might criminate him, as there was an indictment for a criminal offence under the bankrupt laws of the U. S. then pending against him; that thereupon said examination
50 ceased, and pl'ff took no further steps to compel said bankrupt to answer, because he thought it would be better not to press him at that time, and pl'ff did not again examine the bankrupt until November, 1879, and no testimony in contradiction of said admissions of said assignee herein having been produced to the jury, counsel for defendant moved the court to charge the jury as follows, to wit:

"If the jury find that there was an examination of the bankrupt by the assignee in May, 1876, at which the said bankrupt refused to answer any question relating to his property or affairs, then such conduct on the part of the said bankrupt was contempt of the bankrupt court, and it was the duty of the assignee, plaintiff herein, to have brought the same to the attention of said court, and his neglect to do so was reprehensible, and had he done so the said bankrupt court could have compelled the bankrupt to answer."

But the court refused to give the latter half of said charge to the jury in the following words:

"So far as that request to charge states that it was in the
51 power of the assignee to have brought Rosenthal and Mr. Carney's failure to answer to the attention of the court and compelled them to answer, I give you that instruction, but as to the inference that is made here, that he was reprehensible for not doing so, I refuse that part of the instruction. His motives in not taking that course may have been entirely proper."

To which refusal counsel for defendaut excepted then and there, and tendered this bill of exception, and prayed that it might be signed and made a part of the record, which is accordingly done.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of Exceptions No. Five.

Filed January 17th, 1881.

United States Circuit Court, District of Louisiana.

PRESTON PLAYER, ASSIGNEE, *vs.* JOSEPH ROSENTHAL. } No. 8,964.

Be it remembered that on the trial of this case, in open court, the plaintiff, being sworn as a witness in his own behalf, and having testified as already set forth in bill of exceptions No. four, and

there being no contradictory evidence on these subjects,
52 counsel for defendant moved the court to charge the jury as follows:

"That the refusal of the bankrupt to testify further in connection with what he had already sworn to, which is made part of this bill, created such a state of affairs as should have put the assignee and creditors on inquiry; they had the whole effective machinery of the bankrupt law within their reach to investigate and sound to the bottom every business transaction in which the bankrupt had been engaged for years before the adjudication, and if the assignee does not avail himself of the said effective machinery within the two years prescribed by the bankrupt act, he cannot maintain this action if he brought it after said two years elapsed."

But the court refused to charge the jury as above requested, but charged them on this point as follows:

"You are the judges of all the facts of this case. This instruction assumes that at a certain period of time such influence should have arisen in the mind of the assignee. So far as it assumes any fact I decline to give it, and I shall leave the whole
53 question of prescription or no prescription to be determined by you. It is undoubtedly true that if he was put upon inquiry as a reasonable man, which he refused to follow up, and which, if you found as a fact, if he had followed up would have led to a knowledge, then the statute would have been a bar. But it is for you to say whether, upon all the evidence, there has or has not been such concealment and so continued as would qualify the rule as to prescription."

To which refusal counsel for defendant then and there excepted and tendered this their bill of exceptions, and prayed that the same be filed and made a part of the record, which is accordingly done.

(Signed) EDWARD C. BILLINGS,
Judge.

Bill of Exceptions No. Six.

Filed January 17th, 1881.

United States Circuit Court, Dist. of La.

PRESTON PLAYER, ASSIGNEE,
vs.
JOSEPH ROSENTHAL. } No. 8964.

Be it remembered that on the trial of this case, in open court, counsel for the defendant requested the court to charge the jury as follows:

54 1st. "That under the provisions of the bankrupt act of the United States the assignee of a bankrupt may at any and all times obtain orders from the bankrupt court under which he can compel the bankrupt and other persons whom said assignee shall

designate to attend and submit to examinations on oath upon all matters relating to the disposal or condition of the property of the bankrupt, or to his trade and dealings with others, and to all other matters concerning the property of said bankrupt and his estate and the due settlement thereof; that the bankrupt court upon due application by the assignee has the power under the law to compel the attendance of the bankrupt or any other person by warrant directed to the marshal commanding him to arrest such person and bring him forthwith before the court or before a register in bankruptcy for examination as a witness, and that under said bankrupt act the bankrupt court has the power to compel the bankrupt or any such other person summoned for examination to answer all proper questions relating to said bankrupt's property, to its
55 disposol, etc., and in the event of refusal to answer such proper questions by said bankrupt or such other persons said bankrupt court has the power to commit him or them to prison until they shall so answer, and the District Court of the United States for the District of Missouri had all of these powers in 1875 and from then until now." R. S. 5086, 5087.

But the court refused to give such charge except with qualifications in the following words:

"I give you that instruction as a proposition of law, or rather as a series of propositions of law, but I think it is proper for me to say that though I give it I do not mean to say that it shall be applied to this case as an abstract proposition without considering very carefully the circumstances of the case.

"The same, as a proposition of law, is true. But there are other propositions of law which you must consider in connection with that when you consider it in its application to this case. The propositions I shall give you when I come to speak in a narrative form of the case."

56 And counsel for defendant further requested the court to charge the jury as follows:

"2d. The bankrupt is compelled, under the law, when on examination, to answer all questions, even, if so doing, he should criminate himself."

But the court refused to give such charge except with qualifications in the following words:

"I give you that instruction with the same remarks as I have given in connection with the first."

And the charge of the court in narrative form is as follows:

"The statute says that a suit of this sort must be brought within two years from the time that the cause of action has accrued, but the intent and meaning of that statute is not that those who defraud others shall profit by the statute, not *not* that any three or four men can go into a conspiracy and conceal industriously and studiously all cause of action from the assignee, and finally he exhumes it and brings his action within two years from that discovery; if he has

used due diligence, the statute does not conclude him, you have to say that, it being conceded more than two years elapsed since
57 the springing up of the facts out of which this cause arose, the question is, was the action brought within two years from the time when the plaintiff or the assignee ought, by due diligence, to have discovered it. Now due diligence may lead to the discovery of some things and not to others. You cannot lay down any arbibitrary rule and say that a man should have found out this or should have found out that; if there is a deed recorded, and the assignee does not find it out, there may be proof of want of due diligence, but where from, the nature of the transaction it is covered and secreted. And if you find as a fact that the transaction was covered up by what was apparently just and proper, and that books were written out that were just and proper apparently, and that the fraud was in its nature one which rested, therefore, in the bosom of Carney, and those who aided him to perpetuate it; if you find the fraud to be a fact, then the court instructs you that you have to
58 deal with a cause where you might have to be much more tolerant with reference to the statute of limitations or prescription, as we term, in this state. The claim of the plaintiff is, that here was a gross fraud upon the creditors perpetuated by Carney, and aided by Meyer Stern, and Rosenthal. Except by probing the conscience of these people, how could he ascertain that? That is the question for you to decide, and to see if he omitted anything.

The counsel for defendants have urged with a great deal of force, that at a certain time in this transaction disclosures were made. You mast take all that exactly as the evidence adduced before you has shown, and state whether there was due diligence. But the court instructs you that if you find as a fact that this assignee did use all of the threads which a reasonable man in the discharge of his duty could have availed himself of, and that he failed, not by reason of any want of diligence on his part, but the wilful terpitude of those who were engaged in this transaction. If you
59 find that to be the case, this court instructs you, that if he did, after making the discovery, bring the suit within two years, that his right to recover is not barred, and whether it was one or the other of these cases, it is for you to say whether it is a case where this assignee has failed to make the discovery because he did not use due diligence, or whether it is a case where, using due diligence, he failed to make the discovery because the parties to the transaction, who were already the repositories of its existence, one or more of them wickedly concealed it and filed oath upon oath in affecting that concealment. For the court instructed you, that if you find that here was this conspiracy entered into to appropriate this property in fraud of the bankrupt, in fraud of the creditors, and if you find that the defendant knew that Carney was making these false statements under oath, and assented to them

and aided them by implication or by direct statements, that they are to that extent the acts of the defendant."

And counsel for defendant further requested the court to
60 charge the jury as follows:

"The fact that the assignee did not discover his right to certain property of the bankrupt until after the expiration of two years from the time an action accrued to him therefor, does not remove the bar prescribed by the bankrupt act. The law makes no exception."

But the court refused to give such charge, except with qualifications, in the following words:

"That proposition is true as a general poposition, but it has a qualification, which is, that if the party against whom a suit is brought, or against whom a right is claimed, concealed the cause of action so that the assignee could not by reasonable diligence have ascertained it, and if he brought the action within two years from the time, when, after the exercise of due diligence, he did discover the cause of action thus concealed, then the statute is no bar."

To which refusals and qualifications counsel for def't excepted then and there, and tendered this bill of exceptions and prayed that the same be filed and made part of the record; which is done accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Bill of Exceptions No. Seven.

Filed January 17th, 1881.

U. S. Circuit Court, Dist. of Louisiana.

PRESTON PLAYER, ASSIGNEE,
vs.
JOSEPH ROSENTHAL. } No. 8,964.

Be it remembered that on the trial of the rule for a new trial of this cause, taken by defendant in open court, on Saturday, the 15 day of January, 1881, counsel for defendant offered to put upon the stand B. G. Barton, Thomas Wiltz, and ——— as witnesses to prove that they had been members of the jury which tried this case, and that, as alleged in said rule, in arriving at their verdict the said jury were guilty of misconduct and irregulrrity, in this, that in arriving at the amount of their verdict the jury agreed that each juror should mark the sum he found, and that the sum found by dividing the total amount by twelve should be the amount of the verdict, which was accordingly done.

But the counsel for plaintiff objected to the admission of
62 such evidence, on the ground that a juror could not be heard to impeach his own verdict, and the court sustained the ob-

jection and refused to allow the witnesses to testify, to which ruling counsel for defendant excepted, and tendered this his bill of exceptions, and prays that the same may be signed and made a part of the record, which is accordingly done.

(Signed) EDWARD C. BILLINGS, *Judge.*

Depositions of Louis Temme, John Senour, Carl Hirsch, Fred. Lipphardt, and Amos M. Thayer, and the several documents annexed to said depositions, which had been taken in St. Louis under commission, all of which are annexed to and made part of bill of exceptions No. two (2.)

In the Circuit Court of the United States for the District of Louisiana.

PRESTON PLAYER, ASSIGNEE OF THOMAS Carney, Plaintiff,
vs.
BENJAMIN ROSENTHAL, DEFENDANT. } No. 8,964.

63 To the above-named defendant or his attorney of record:

You will please take notice that on the fourteenth day of April, 1880, at the law office of J. M. and C. H. Krum, being rooms Nos. 4 and 5 at No. 307 Olive street, in the city of St. Louis, and State of Missouri, before Walter B. Douglas, a notary public, duly commissioned and qualified within and for said city and State, I will, on the part of said plaintiff, proceed to take the depositions of the following-named witnesses, to be used in evidence in said cause, to wit: Louis Tencca, John Seccour, Chancey B. Keeler, Carl Hirsch, Amos M. Thayer, and Fred. Lipphardt, all of said witnesses being residents of said city of St. Louis, and that the said taking of depositions will be begun on said day, at the hour of ten o'clock in the morning, and will be continued until the hour of six o'clock of said day, when, if the said taking of depositions shall not have been completed, it will be continued between the same hours on the next day, and such subsequent days thereafter, at the same place, as may be necessary for its said completion.

64 (Signed) THOS. J. SEMMES,
Attorney for Plaintiff.

Service accepted, New Orleans, La., March 29, '80. All legal objections reserved.

(Signed) CHAS. S. RICE,
Attorney for Deft.

THE UNITED STATES OF AMERICA,
THE STATE OF MISSOURI,
CITY OF SAINT LOUIS.

To Carl Hirsch, John Senour, Lewis Temm, C. H. Keeler, Fred. Lipphardt, greeting:

You are hereby commanded that, setting aside all manner of excuse and delay, you be and appear before Walter B. Douglas, a notary public within and for the city of Saint Louis and State of Missouri, on the fourteenth day of April, 1880, at the hour of 10 o'clock in the forenoon of said day, at the law office of J. M. & C. H. Krum, 307 Olive street, in the city of St. Louis, in said state, then and there to testify and the truth to say in a certain cause now pending in the Circuit Court of the United States for the District of Louisiana, wherein Preston Player, assignee, is plaintiff, and Joseph Rosenthal is defendant, on the part of the plaintiff,
65 and hereof fail not at your peril.

And the officer serving this subpœna is hereby commanded to have it at said place, at said time, with the manner of its service hereupon returned.

Witness Walter B. Douglas, notary public within and for said city and state, with my notarial seal hereto affixed at Saint Louis, in said state, this twelfth day of April, A. D. 1880.

[SEAL.] (Signed) WALTER B. DOUGLAS,
Notary Public.

Executed this writ in the city of St. Louis, this 13 day of April, 1880, by reading the same to the within-named witnesses, Carl Hirsch, John Lenon, Louis Temm, and Fred. Lipphardt. Within-named witness, C. H. Keeler, not found.

JOHN W. DRAKE, *Constable.*
Per JOS. F. RYAN, *Deputy.*

U ITED STATES OF AMERICA,
EASTERN DISTRICT OF MISSOURI.

STATE OF MISSOURI,
CITY OF ST. LOUIS, } *ss.*

Be it remembered that on this fourteenth day of April, in
66 the year of our Lord one thousand eight hundred and eighty, I, Walter B. Douglas, a notary public in and for the state and city aforesaid, duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit courts of the United States, did call and cause to be and personally appear before me, at the law office of J. M. & C. H. Krum, being rooms No. 4 and 5 at number 307 Olive street, in the city of Saint Louis, in said Eastern District of Missouri, in the state aforesaid, between the hours of ten o'clock in the morning

and six o'clock in the afternoon of said day, Louis Temm, to testify and the truth to say on the part and on behalf of the plaintiff in a certain suit or matter of controversy now depending and undetermined in the Circuit Court of the United States for the District of Louisiana, at New Orleans, in the district aforesaid, wherein Preston Player, assignee of Thomas Carney, is plaintiff, and Joseph Rosenthal is defendant.

Appearances:

Chester H. Krum, Esq., for plaintiff; Nathaniel Meyers, Esq., for defendant.

And the said Louis Temm, being about the age of
67 thirty-five years, and having been by me first cautioned and sworn to testifiy the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, and he, being carefully examined, did thereupon depose, testify, and say as follows, viz:

Q. What is your name?
A. Louis Temm.
Q. Where do you reside?
A. No. 1946 Cass Av., St. Louis.
Q. In what business are you engaged?
A. Porter in a boot and shoe store.
Q. By what house are you employed?
A. J. D. Faulkner, 611 N. Main st.

(Signed) LOUIS TEMM.

Sworn to and subscribed before me on the day at the place and within the hours first aforesaid.

[SEAL.] (Signed) WALTER B. DOUGLAS.
Notary Public.

Not being able to complete the taking of said depositions, by consent of the counsel appearing for the plaintiff, and of the counsel appearing for the defendant, I adjourn the further taking of the same till to-morrow, then to be continued at the same place
68 and within the same hours mentioned in the annexed notice, to wit, at the hour of three o'clock in the afternoon.

[SEAL.] WALTER B. DOUGLAS,
Notary Public.

Pursuant to adjournment as above stated, I, Walter B. Douglas, notary public as aforesaid, did call and cause to be and personally appear before me, at the law office of J. M. & C. H. Krum, being rooms Nos. 4 and 5, at number 307 Olive street, in the city of St. Louis, in the Eastern District of Missouri, this fifteenth day of April, A. D. 1880, at the hour of three o'clock in the afternoon of said day, Louis Temm, John Secour, Carl Hirsch, and Fred Lipphardt to testify and the truth to say, on the part and on behalf of the plaintiff in the certain suit or matter of controversy aforesaid

now depending and undetermined in the Circuit Court of the United States for the District of Louisiana, at New Orleans, in the District aforesaid, wherein Preston Player, assignee of Thomas Carney, is plaintiff, and Joseph Rosenthal is defendant. And at the office of J. M. & C. H. Krum as aforesaid, and between the hours of three and six o'clock in the afternoon of the day
69 last aforesaid, I continued the taking of said deposition as follows, and the said Louis Temm, in continuation of his deposition commenced yesterday, on his said oath further says:

Q. Do you know Benjamin Rosenthal?

A. No, sir.

Q. Do you know Thomas Carney?

A. Yes, sir.

(Signed) LEWIS TEMM.

Sworn to and subscribed before me on the day and at the place last aforesaid, and between the hours of three and six o'clock in the afternoon of said day.

[SEAL.] (Signed) WALTER B. DOUGLAS,
Notary Public.

Not being able to complete the taking of said depositions, I adjourn the further taking of the same till to-morrow, then to be continued at the same place and within the same hours mentioned in the annexed notice.

(Signed) WALTER B. DOUGLAS,
Notary Public.

Pursuant to adjournment as above stated, on the sixteenth day of April, 1880, between the hours of ten o'clock in the forenoon and six o'clock in the afternoon, at the law office of J. M. &. C. H.
70 Krum, being rooms Nos. 4 & 5, at No. 307 Olive street, in the city of St. Louis and State of Missouri, C. H. Krum being present on part of plaintiff and Nath'l Meyers on part of defendant, I continued the taking of said depositions, as follows:

And the said John Senour, being about the age of thirty-eight years, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, and he being carefully examined, did thereupon depose, testify, and say as follows, viz:

Q. By Judge Krum: How were you employed, Mr. Senour, in 1875?

A. I was with Mr. Carney; it was Carney, Stover & Co., or Thos. Carney & Co.

Q. Was Mr. Stover interested in the business in June, 1875?

A. I think not; I know he wasn't.

Q. In whose employ were you in the month of June, 1875?

A. The concern of Thomas Carney & Co.

Q. 4. Was anybody interested in the business at that time but Mr. Carney?

71 A. Not that I know of. He told me that he was the sole proprietor.

Q. 5. What is the book which I now show you (book shown to witness marked by notary Exhibit A), and in whose handwriting are the words and figures in pencil between pages 102 to 123?

A. These figures on left-hand margin (in two columns) and the writing and the column of figures made in ink are mine.

Q. What is the book?

A. This part of it between pages 102 and 123 is the inventory book of Thos. Carney & Co.

Q. Do you remember when that inventory was made?

A. I think it was made at the time of this date in my handwriting, June 9, 1875; it was about the date we took the inventory, perhaps just the date.

Q. Were those goods in the store of Thomas Carney at the time that inventory was taken?

A. Yes, sir.

Q. Did you make the inventory from personal examination and count of the goods?

A. Yes, sir. Well, I did not count all of them; I had help.

72 Q. Well, you took the account of stock?

A. I took the account of stock; I counted part of the goods. The inside column on the right-hand side of each page is my handwriting.

Q. Do you know what became of those goods of Mr. Senour?

A. I do not know as I do; the last I saw of them they were in the house down there, 314 North Main st.

Q. Did you know Benjamin Rosenthal?

A. No, sir.

Q. When did you leave the employ of Thomas Carney?

A. I think it must have been—well, I could not tell you; it was some time in 1875.

Q. Was it in the summer or fall?

A. In the summer.

Q. Down to the time when you left had those goods been sold?

A. I know nothing about it, only what I was told.

Q. Were they moved out of Carney's store before you left his employ?

A. No, sir.

Q. From whom did you learn that the goods had been sold?

A. Mr. Carney told me that he had sold them.

73 Q. Did you know the auction house of Rosenthal here in St. Louis?

A. Yes, sir; Rosenthal & Co.

Q. By whom was the business carried on?

A. Well I think it was carried on by Mr. Meyer Stern and Mr. Isaac Stern.

Q. Do you know whether any goods were sent by Carney earlier than June, in 1875, to be sold at auction by the Sterns acting for Rosenthal?

Objected to as leading by Mr. Myers.

A. We sent goods over there at various times to be sold, before June, 1875. In the year 1875, previous to June.

Q. When did Carney begin to send goods to Rosenthal to be sold at auction?

A. We sent—we began to send goods over there, as I remember, early in the year 1874. They were boots and shoes.

Q. Were they sent over in large or small quantities?

A. Sometimes we would send quite a lot; generally we would send three or four cases, from that up to considerable of a dray load at a time.

Q. At what time of day were the goods sent from Carney's
74 store to Rosenthal's auction house as a general thing?

A. Late in the evening from five to six and seven o'clock.

Q. How often during the week would goods be sent in this way?

A. I don't think I could state how often.

(Signed) JOHN SENOUR.

Sworn to and subscribed before me at the place and on the day and between the hours last aforesaid.

(Signed) WALTER B. DOUGLAS,
Notary Public.

Not being able to complete the taking of said depositions, by the consent and agreement of the counsel appearing for each of the parties to the said matter of controversy, I adjourn the further taking of the same till Monday the 19th day of April, 1880, then to be continued at the same place and within the same hours mentioned in the annexed notice, to wit, at the hour of two o'oclock P. M.

[SEAL.] (Signed) WALTER B. DOUGLAS,
Notary Pnblic.

Pursuant to adjournment as above stated, on the nineteenth day of April, 1880, between the hours of ten o'clock in the fore-
75 noon and six o'clock in the afternoon, to wit, at the hour of two o'clock in the afternoon of said day, at the law office of J. M. & C. H. Krum, being rooms Nos. 4 and 5, at No. 307 Olive street, in the city of Saint Louis, and State of Missouri.

C. H. Krum being present on the part of the plaintiff, and Nathaniel Myers being present on the part of the defendants, I continued the taking of said depositions, as follows:

And the said John Senour, in continuation of said deposition commenced on the 16th April, 1880, on his said oath further says:

Q. 25. In what capacity, Mr. Senour, did you act during most of the time you were in Carney's employ?

A. 25. I was the buyer and had charge of the stock in the house.

Q. How often in the course of a week was Carney in the habit of sending goods to Rosenthal's to be sold at auction?

A. I think we must have sent goods over there three or four times a week on an average.

Q. During what time did this practice of sending goods over there in this way so often continue?

76 A. We began sending goods over there in February or March of 1874, and continued to send them, more or less, up to the time that Mr. Carney closed out.

Q. Do you know anything of a stock of goods, boots and shoes manufactured at Jefferson City, which were in store at Rosenthal's. If so, state whether Carney bought those goods, and in what place they were left to be sold?

A. There was a stock of goods, perhaps 25 or 30 cases of mostly ladies work, which I counted and examined. Those goods were left in the basement of Rosenthal's auction house, excepting, perhaps, four or five cases, which we brought down to the store. These goods were bought by Mr. Carney.

Q. What disposition was made of those goods that remained at Rosenthal's?

A. I think Mr. Rosenthal, Mr. Stern sold them. Q. by Mr. Meyer. Do you know? A. I do not know to a certainty they were left to be sold.

Q. Do you remember about what time you heard that
77 Carney had sold out his stock of boots and shoes to Rosenthal?

A. I think it was sometime in June, 1875.

Q. At the time when you heard this, where was Carney's stock of boots and shoes?

A. They were in his store, No. 314 North Main st.

Q. How long did they remain there after you heard that they had been sold?

A. I think perhaps three or four weeks.

Q. Did Rosenthal sell any of them from Carney's store?

A. They had a one day's sale that I remember, of auction sale?

Q. Was that the only sale you remember?

A. Yes, sir.

Cross-examination by Mr. Myers.

Q. Do you know the def't Rosenthal?

A. No, sir.

Q. Did you ever see him?

A. I think I saw him once in Mr. Stern's store, in Mr. Rosenthal's auction house; I meant Mr. Rosenthal's store, not Stern's.

Q. When was that?

A. I could not say, sir.

Q. Do you remember what conversation you had with him then?

A. I did not speak to him.

78 Q. 5. Have you ever seen any documents signed by him?

A. No, sir.

Q. In regard to the various consignments made by Carney to that auction house of goods for sale, what, if anything, was then out of the usual course of business as transacted in this city?

A. When Mr. Carney bought Mr. Stover out, he got a miserable lot of goods and could not sell them to the regular trade, and he would make consignments every few days to Mr. Rosenthal of old goods principally.

Q. Then there was nothing out of the ordinary course of trade in those consignments?

A. Well, towards the last, during all of 1875, that Mr. Carney was in business, he seemed to want to close out his stock, and sent over to the auction house some goods that were new and saleable. He sent over more goods than I thought, being superintendent of the stock, that he ought to do, not knowing his intention.

Q. 8. In regard to this inventory book, when did you write the date referred to?

A. My recollection is that the date was put there the day we made the list of goods.

79 Q. Did you write down while the items were called off to you?

A. Yes, sir.

Q. Did you personally verify the corrections of the call with respect to quantity, lot number, and character of articles called off, or did you simply write down what was called off to you.

A. I counted part of the goods, and our head and assistant porter counted the balance. The kind of goods and lot number, I might say, I verified.

Q. Were the lot numbers on the boxes?

A. Yes, sir.

Q. Were you sufficiently near the boxes to observe whether the person who called off called the correct lot numbers?

A. Not all of the time.

Q. Did you personally verify the count?

A. No; only what I counted myself.

Q. Were you present when any disposition was made by Carney of the goods mentioned in this inventory book?

A. No, sir.

Q. Did you say that there was a sale had one day of these

80 goods mentioned in the inventory book?

A. Yes, sir; I remember one day's sale of the goods at the store; I was present.

Q. Was it an open public sale?

A. Yes, sir.

Q. Whose name was up over the store at the time?
A. Joseph Rosenthal & Co.
Q. How long had it been up?
A. I think three or four weeks?
Q. In large letters, so as to be noticeable?
A. Yes, sir.
X-Q. 20. Do you know how extensively that sale had been advertised?
A. My recollection is that it was advertised in the Globe-Democrat, and I think they sent out circulars, but I am not certain.
Q. Were there many present at the sale?
A. Well, there were a good many present, a good many buyers.
Q. Do you know Mr. Carney's assignee, Mr. Player?
A. No, sir.
Q. When did you see Carney last?
A. I saw Mr. Carney yesterday.
Q. Did you have any talk about your testimony in this case?
81 A. He asked me if we were through with our testimony.
A. I told him that we had given part of it and were not through.
Q. Who kept Carney's books at the time of this transaction?
A. Charley Lane.
Q. Did he keep a regular set of books?
A. I do not know. I never went to the books in my life. I have gone and looked at some customer's account or at my own account, but I never went through them.
Q. Were they open to you; you had access to them, didn't you?
A. Yes, sir.
Q. Do you know if this transaction that you have been speaking of was entered in his books?
A. No, sir; I do not.
Q. You spoke of a transaction with regard to some boots and shoes manufactured at Jefferson City. Where did you first see those boots and shoes?
A. I saw them in the basement of Mr. Rosenthal's auction-room the first time.
Q. Did you say those goods became Carney's.
A. Mr. Carney told me he had bought those goods and
82 sent me along with the salesman to count them.
Q. Did you know anything about it except what Carney told you?
A. No; I did not.
Q. Do you know, of your knowledge, what became of those goods?
A. I think we must have sold some eight or ten dozen pair—the balance of them; the last I saw of them over in that same basement.

Q. What did the whole lot amount to?
A. I do not know; never did know.
Q. What are you doing now?
A. I am a boot and shoe salesman.
Q. What house?
A. Pancott, Sage, Morse, Rochester, N. Y.
Q. Where do you reside?
A. Here in the city.
Q. Are you located here, selling for them?
A. This is my home.

(Signed) JOHN SENOUR.

Sworn to and subscribed before me this 19th day of April, 1880, at the place and within the hours mentioned in the annexed
83 notice.

[SEAL.] (Signed) WALTER B. DOUGLAS,
Notary Public.

Not being able to complete the taking of said deposition, by the consent and agreement of the counsel appearing for each of the parties to the said matter of controversy, I adjourn the further taking of the same until Wednesday, the twenty-first day of April, 1880, then to be continued at the same place and within the same hours mentioned in the annexed notice, to wit, at the hour of half-past two o'clock in the afternoon of said day.

[SEAL.] (Signed) WALTER B. DOUGLAS,
Notary Public.

Pursuant to adjournment, as above stated, on Wednesday, the 21st day of April, 1880, between the hours of ten o'clock in the forenoon and six o'clock in the afternoon, to wit, at the hour of half-past two o'clock in the afternoon of said day, at the law office of J. M. and C. H. Krum, being rooms Nos. 4 and 5 at number 307 Olive st., in the city of St. Louis and State of Missouri, C. H. Krum being present on the part of plaintiff, and Nathaniel Myers being present on the part of defendant, I continued the taking
84 of said depositions, as follows:

And the said Louis Temm, being recalled by the plaintiff, in continuation of his said deposition, commenced on the fourteenth of April, 1880, on his oath further says:

Q. In whose employ were you, Mr. Temm, in the spring and early summer of 1875?
A. Thomas Carney & Co.
Q. That was not a firm, was it?
A. I never saw the company, but that was the style of the concern.
Q. In what capacity were you employed?
A. I was acting as porter, and as salesman, and as stock clerk.

Q. Did you ever see the book before? Book shown to witness, heretofore identified by witness Senour, and marked Exhibit A.

A. Yes, sir, I have seen that book.

Q. What is the book?

A. It was at one time a sales book, and it was afterwards used to take stock in.

Q. You mean in the store of Carney?

A. Yes, sir.

Q. What do the words and figures continued between pages 102 and 123, inclusive of both, under June 9, 1875, represent,

85 if you know?

A. That was, when we took stock, Mr. Senour and I, it was put down in this book, then Carney sold out the concern.

Q. At what date was this stock taken?

A. I suppose the date at the head is the date when we began to take stock.

Q. To whom was the stock of goods represented by that inventory sold, if you know?

A. Sold to an auction house, Joseph Rosenthal, that is the way I understood it.

Q. Do you remember about the time of the sale?

A. It was made a few days after we got through taking the stock.

Q. What sort of goods were those called for by that inventory, new or old?

A. New goods, all fresh goods.

Q. How long had they been in the store?

A. I do not suppose the longest had been there six months, the majority not so long.

Q. Where was Rosenthal's auction house at the time

86 these goods were sold?

A. On Main street between Locust and Vine.

Q. Where was Carney's place of business?

A. Between Locust and Olive on Main.

Q. Do you know whether prior to the sale of this stock of goods to Rosenthal Carney hadn't sent any goods to be sold at auction at Rosenthal's place?

A. Yes, sir.

Q. When did that begin?

A. He sent goods over there fully six months before he sold out to him.

Q. How often were goods sent?

A. Mostly every week, sometimes two or three times a week.

Q. What time in the day would goods be sent?

A. Sometimes in the day and sometimes in the evening, after we were through our day's work, after we would get through filling orders.

Q. After the stock of goods, which you have identified, had been sold to Rosenthal where did they remain?

A. They were at the same place where they bought them,
87 so long as I knew about them. They had an auction sale there in the house.

Q. Who generally attended to sending goods to Rosenthal to be sold at auction?

A. Mr. Carney and myself.

Cross-Examination by Mr. Myers.

Q. Did you ever see the defendant Rosenthal?

A. I saw an old gentleman that was pointed out to me as Mr. Rosenthal.

Q. Were you introduced to him?

A. No, sir.

Q. Did you ever speak to him?

A. No, sir, I did not.

Q. Did you ever see any documents written by him?

A. No, sir.

Q. Who pointed him out to you?

A. A young man in Rosenthal's store told me that the gentleman whom he pointed out to me was Mr. Rosenthal.

Q. Did you do any of the writing in the book that has been shown you?

A. Yes, some of it. One of the items on page 123 is in my writing. Between pages 102 and 123 this is all in my handwriting. I did the calling off and John Senour did the writing.

88 Q. About how far apart were you while this was being done?

A. About five feet, five or six feet, Senour stood behind me.

Q. Were you present when this stock of goods was sold by Carney to Rosenthal?

A. No, all I know about was what Carney told me, and because I saw Rosenthal's sign stuck up over the door.

Q. Do you remember what was on that sign?

A. I do not remember what was on the sign, my recollection is that it was J. Rosenthal & Co.

Q. How large a sign was it?

A. It extended nearly the whole width of the store, 20 feet, and a foot and a half wide, a good, respectable sign.

Q. How long did this sign remain up?

A. It was there, to my knowledge, two or three weeks, it was there when I left the store.

Q. How many sales were made then?

A. Only one that I assisted in.

Q. Was that sale known to the whole trade?

A. Yes, it was advertised.

Q. Thoroughly, extensively?

89 A. I know it was advertised; I do not know how thoroughly. There was time enough to advertise it thoroughly.

Q. 15. Well, it was advertised thoroughly to the best of your knowledge, wasn't it?

A. Well, yes, to the best of my knowledge.

Q. Was the sale attended by a great many merchants?

A. Yes, sir; a great many of them.

Q. Do you know what was the condition of business was here at that time?

A. It was fair in our line—the shoe line.

Q. Carney stood pretty well here at that time, didn't he?

A. So far as I know.

Q. Do you know if he was looked upon by the public as a man of wealth?

A. He was considered to be a man who had plenty of money.

Q. Was the house of Rosenthal the principal auction house in the city at that time?

A. I believe it was considered the best, the largest.

(Signed) LOUIS TEMM.

90 And the said Carl Hirsch, being about the age of forty-seven, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, and being carefully examined, did thereupon depose, testify, and say as follows:

Q. Where do you reside?

A. No. 1217 Saint Ange avenue, St. Louis, Mo.

Q. Are you acquainted with Thomas Carney and Joseph Rosenthal?

A. Yes, sir.

Q. When did you first become acquainted with Carney, and who introduced you?

A. It is not for me to say, Judge; I don't remember.

Q. Did you buy any goods from Thomas Carney in 1875?

A. I could not say positively; I bought some goods from Mr. Carney, but what year or time it was I can't remember.

Q. What sort of goods were they?

A. I don't recollect that.

91 Q. Do you remember whether they were lye or soda?

A. I have a slight recollection that it was something like that, but I am not sure.

Q. Did you pay cash for these goods?

A. As far as I remember; I generally pay cash.

Q. What became of those goods?

A. I do not remember; I suppose I sold them.

Q. Did you send any of them to New Orleans?

A. I could not say for certain; probably I did, but I don't remember.

Q. Was the money which you paid Carney for these goods given or handed back to you?

A. Not as know of.

Q. I will ask you if Joseph Rosenthal returned to you the amount of money representing the invoice price of the goods you got from Carney?

A. I do not remember.

Q. Do you mean that you do not remember the transaction or that Rosenthal never gave you back the money?

A. If he did I have forgotten it; I do not think he did it.

92 Q. Mr. Hirsch, I now show you an account of sales dated Dec'r 10, 1875, and ask you to state what it is and for what purpose it was given?

A. This is a long time back; I do not remember. It is my writing; I don't remember anything about it.

Q. Do you mean to be understood that you have no recollection at all of the transaction covered by the account of sales?

A. Hardly, sir; I can't recall it somehow.

Q. Why can't you recall it?

A. I do not know myself. In the first place it was a long time ago, and my memory is not extraordinary.

Q. When Carney sold you the lye and soda did he give you an invoice?

A. I don't remember, sir; I suppose he did.

Q. Have you looked for any such invoice recently?

A. I have not.

Q. Did you preserve your books and papers pertaining to your business for the year 1875?

A. I couldn't say whether I have or not.

93 Q. To whom did you give this account of sales which you have identified as made by you?

A. I really do not know; it is in my handwriting, but who got it, or how it was given, I do not remember.

Q. When were the goods sold which this account of sale called for?

A. I have no recollection; I suppose they must have been sold here from the way it looks. I do not know, sir.

Q. Did Mr. Rosenthal leave these goods with you to be sold for him?

A. I have no recollection of it.

Q. If this account of sale was made and given to Rosenthal, would or would it not indicate as a part of the ordinary business of your house that these goods had been left with you by Rosenthal for sale.

(Objected to.)

A. It does look reasonable that that is it, but I might have gotten them some other way.

(Answer also objected to by Mr. Myers.)

Q. Now, Mr. Hirsch, is it not a fact that you gave this account of sales which you have identified to Thomas Carney?

A. Not to my recollection.

Q. If you sold the goods for Rosenthal, as I understand you,
94 the natural course of your business would be to render the account of sales to Rosenthal; am I correct?

(Objected to as incompetent and irrelevant, and because the witness has not stated he sold the goods for Rosenthal.)

A. That would be the regular way of doing I should think.

Q. If you sold the goods for Carney, would or would not the account of sales be rendered to Carney, although made out in the name of Rosenthal?

A. If I were to sell goods for Carney I would make out account of sales for Rosenthal; I would not sell goods for one and make out the account sales to another.

Q. You stated that you did remember having bought some goods from Carney?

A. Yes; I did buy some goods and have some transactions with Mr. Carney.

Q. I understand you to say that these goods were lye and soda?

A. I would not be positive about that.

Q. Do you remember having received such goods at any time from Carney?

A. I do not remember of having received any particular
95 goods at any time, though I have purchased some goods of of Mr. Carney, but what it was, I don't remember.

Q. In what business were you engaged in 1875?

A. I was a general dealer, and am to-day; buy and sell most anything that comes along; I also do some little commission business.

(Signed) CARL HIRSCH.

Sworn to and subscribed before me, the 21st day of April, 1880, at the place and within the hours mentioned in the annexed notice.

[SEAL.] (Signed) WALTER B. DOUGLAS,
Notary Public.

Not being able to complete the taking of the said depositions, by the consent and agreement of the counsel appearing for each of the parties to the said matter of controversy, I adjourn the further taking of the same until Friday, the 23d day of April, 1880, then to be continued at the same place and within the same hours mentioned in the annexed notice, to wit, at the hour of half-past eleven o'clock in the forenoon of said day.

[SEAL.] (Signed) WALTER B. DOUGLAS,
Notary Public.

96 Pursuant to adjournment as above stated, on Friday, the 23d day of April, 1880, between the hours of ten o'clock in the forenoon and six o'clock in the afternoon, to wit, at the hour of half-past eleven o'clock in the forenoon of said day, at the law

office of J. M. & C. H. Krum, being rooms Nos. 4 and 5 at No. 307 Olive street, in the city of Saint Louis and State of Missouri, C. H. Krum being present on the part of plaintiff, and Nathaniel Myers being present on the part of defendant, I continued the taking of said depositions as follows:

And the said Fred. Lipphardt, being about the age of thirty-three years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, and he, being carefully examined, did thereupon depose, testify, and say as follows, viz:

Q. Where do you live?

A. Here, in St. Louis.

Q. Were you in the employ of Joseph Rosenthal in 1875 and 1876?

97 A. I was, from 1873 to Oct., 1876. That is, of Rosenthal and his successor, M. Stern & Co.

Q. When was the firm of M. Stern & Co. organized?

A. About the middle of July, 1876.

Q. In what capacity were you employed there?

A. As bookkeeper.

Q. I now show you a ticket, beginning with date July 17, an entry, by cash, $2,000, marked by notary Exhibit C. I wish to know in whose handwriting the words and figures are, how the paper came to be made, and for what purpose it was made?

A. Mr. Rosenthal came to this city and told me that he intended to furnish the firm with $2,500 additional capital, and to the best of my recollection, I made Mr. Rosenthal this statement, showing when and how this twenty-five thousand dollars had been received.

Q. This was in 1876?

A. No; it must have been in 1875.

Q. Who gave you the money that these various items called for?

A. I think the most of it was handed to me by Mr. Rosenthal in person.

Q. What was done with the money?

98 A. Placed in bank and used in the business.

Q. In what bank was it put?

Q. In what bank was it put?

A. I think at that time we did business with both the German and State Savings.

Q. Did Thomas Carney have an interest in the business there?

A. Not to my knowledge.

Q. In whose name were these $25,000 credited on the books of the firm?

A. Joseph Rosenthal.

Q. Was Thomas Carney about the store of Rosenthal in any capacity in the summer of 1875?

A. Yes; he was a clerk there.

Q. What were his duties as clerk?

A. Mr. Rosenthal engaged him to check off accounts of sales after they had been made.

Q. Did he have anything else to do?

A. No; that was his particular duty.

Q. You say that the firm of M. Stern & Co. was organized in the summer of 1876?

A. Yes; in 1876.

Q. Do you remember how the books were closed at that time?

A. When Mr. Rosenthal ret'd?

Q. Yes.

99 A. The notes were all paid, and as much as possible all accounts; M. & Isaac Stern bought from Mr. Rosenthal the stock, the ledger accounts, and the bills receivable on hand.

Q. At what discount, if any, from the cost price of the goods did Stern & Co. buy the stock?

(Objected to by Mr. Myers as irrelevant.)

A. I do not remember; I know that there was a discount on each kind of goods, but I do not remember what it was; it varied on different things; there was also a discount from the notes and bills and accounts.

Q. Who bought the fixtures?

A. Stern & Company.

Q. Was there any discount off from the price of them?

A. My recollection is that Stern & Co. bought the fixtures for $250, a great deal less than they had originally cost.

Q. Do you know whether Meyer Stern has any relationship to Joseph Rosenthal?

A. I do.

Q. What is it?

100 A. Joseph Rosenthal is Meyer Stern's father-in-law.

Q. Do you know what became of the books of Joseph Rosenthal?

A. I was told that they were taken to New Orleans.

Q. To whom did you deliver them?

A. I left them in the safe.

Q. What period did the books cover?

A. I think from the beginning of Joseph Rosenthal's business until the summer of 1875.

Q. By whose direction, if you had any direction, did you close these books?

A. I think by Meyer Stern's; he was the manager for Mr. Rosenthal.

Q. What was done with the lease of the building when Rosenthal quit; did Stern buy it?

(Objected to by Mr. Myers as irrelevant.)

A. Not that I know of.

Cross-examination by Nath'l Myers:

Q. Do you know what salary Carney got from Rosenthal; and, if so, state it?

A. Yes; he got fifty dollars a month.

101 Q. For how long a time was he so occupied as clerk.

A. I could not state the time, but it was not less than six nor more than twelve months.

Q. What period of time intervened between Carney's giving up his old business as a merchant in St. Louis, and his entering the employ of Rosenthal?

A. To the best of my recollection, he started with Joseph Rosenthal in the summer of 1875.

Q. Well, was'nt it several months after he went out of business himself?

A. I could not say.

Q. When Carney sold out his shoe business to Rosenthal in the summer of 1875, did'nt he, Carney, then engage in the wholesale grocery business on Second street, in this city?

A. I heard of that, but it was only for a very short time.

Q. Wasn't he in that business for several months?

A. He might have been for a month or two, but I know it was a very short time.

Q. Wasn't he out of that grocery business a couple of months before he entered into the employ of Rosenthal?

102 A. I can't say one way or the other.

Q. Up to the time Carney sold out his boot and shoe business, had he not been regarded by the business community in general as a man of considerable means?

A. I heard that he had brought $225,000 dollars from Kansas.

(Answer objected as irrelevant, incompetent, and non-responsive.)

Q. He had been governor of Kansas, had'nt he?

A. That was what I heard.

Q. What was his reputation on the street as to solvency before he sold out to Rosenthal?

A. That I do not know; my business kept me busy, so that I could not get about among merchants.

Q. Was he not then rated in the commercial agencies as being worth from $150,000 to $200,000.

(Objected to by Judge Krum as incompetent and irrelevant.)

A. I do not remember.

Q. How long had he been in that boot and shoe business?

A. A year and a half or two years, so far as I can remember.

Re-examination.

103 Q. Explain about the closing of the book in 1875?

A. Referring to the question put to me by Judge Krum, as to what period was covered by the books of Joseph Rosenthal, my answer was, "I think from the beginning of Joseph Rosenthal's business until the summer of 1875." By way of explanation, I would say that at that time, that is, in the summer of 1875, a new ledger was commenced, and to my best recollection this new ledger was

not sent to New Orleans. This new ledger covered the period from the summer of 1875 to the close of Joseph Rosenthal's business.

(Signed) FRED. LIPPHARDT.

Sworn to and subscribed before me this 23d day of April, 1880, at the place and within the hours mentioned in the annexed notice.

[SEAL.] (Signed) WALTER B. DOUGLAS,
Notary Public.

104 Not being able to complete the taking of the said depositions by the consent and agreement of the counsel appearing for each of the parties to the said controversy, I adjourn the further taking of the same until Monday, the 26th day of April, 1880, then to be continued at room number 5, at the court-house of the city of Saint Louis, being situated in the city of Saint Louis, and State of Missouri, at the hour of four o'clock in the afternoon of said day.

[SEAL.] (Signed) WALTER B. DOUGLAS,
Notary Public.

Not being able to continue the taking of said depositions on this 26 day of April, 1880, by the consent and agreement of counsel appearing for each of the parties to the said matter of controversy, I again adjourn the further taking of the same until Saturday, the 1st day of May, 1880, then to be continued at the law office of J. M. & C. H. Krum, being rooms 4 and 5, at No. 307 Olive street, in the city of St. Louis, and State of Missouri, at the hour of nine o'clock in the forenoon of said day.

[SEAL.] (Signed) WALTER B. DOUGLAS,
Notary Public.

105 Pursuant to adjournment as above stated, on Saturday, the 1st day of May, 1880, at the hour of 9 o'clock in the forenoon, at the law office of J. M. & C. H. Krum, being rooms 4 and 5, at No. 307 Olive street, in the city of St. Louis, State of Missouri, C. H. Krum being present on part of the pl'ff, and Nath'l Myers being present on the part of deft, I continued the taking of said depositions, as follows: Amos M. Thayer, one of the witnesses in the notice hereto attached, being about the age of thirty-eight years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy, and he being carefully examined, did thereupon depose, testify, and say as follows:

Q. Where do you reside?

A. In St. Louis, Mo.

Q. What is your profession?

A. Lawyer.

Q. You are also one of the judges of the St. Louis Circuit Court.

A. Yes.

106 Q. I now show you a paper with the caption, Office of Western Fertilizer & Chemical Works, No. 417 North Main st., St. Louis, January 1, and which is followed by a certificate dated the 29th July, 1876, signed Amos M. Thayer, notary public, and I want to know whether the certificate was given by you, and if so, the circumstances under which it was given, and whether the writing which precedes your certificate is a true copy of an original paper exhibited by you.

A. All I can say in response to that question is, that on the 29 July, 1876, I held the office of notary, and Governor Thomas Carney was at that time a client of mine, and on that day he brought me a paper purporting to be signed by J. Rosenthal, and he also handed me this paper, which has been shown to me by Judge Krum, marked Exhibit D by the notary, and requested me to compare this paper, Exhibit D, with the other paper, which he

107 also handed to me, and make an official certificate, that this paper, Exhibit D, was a true copy of the other. I did so, compared the two papers, ascertained that this paper, Exhibit D, at least the written portion of it, was a true copy of the other, and thereupon I made the certificate that appears upon the back of this paper, Exhibit D, and thereupon I handed both papers back to Governor Carney.

Cross-examination by Nathaniel Myers, Esq.

Q. Do you know in whose handwriting the body of Exhibit D is, including the two signatures of J. Rosenthal?

A. Well, I should say that the body of the paper is in Governor Carney's handwriting. I am not so certain about the signatures J. Rosenthal, but I think they are also in Governor Carney's handwriting. The whole of the certificate is my handwriting and the seal is mine.

(Signed) AMOS M. THAYER.

108 Sworn to and subscribed before me at the place on the day and at the hour to which the taking of these depositions was by consent of parties last adjourned.

[SEAL.] (Signed) WALTER B. DOUGLAS,
Notary Public.

UNITED STATES OF AMERICA, } *ss.*
EASTERN DISTRICT OF MISSOURI, }

I, Walter B. Douglas, a notary public in and for the city of Saint Louis, and State of Missouri, in the district aforesaid, and duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit courts of the United States, do hereby certify that the reason for taking the foregoing deposi-

tions is, and the fact is, that the testimony of said witness is material and necessary for the plaintiff in the cause in the caption of said depositions named, and that the said witnesses live and did live at the time of taking said depositions in the city of St. Louis, and
State of Missouri, the same being at a greater distance than
109 100 miles from the city of New Orleans, where the court
at which it is expected the said cause will be tried was appointed by law to be held, to wit, more than 1,000 miles therefrom.

I further certify that a notification of the time and place of taking the said depositions signed by the attorney for the plaintiff was made out and served on Joseph Rosenthal, the adverse party, or Charles S. Rice, his attorney, to be present at the taking of the said depositions, and to put interrogatories if he might think fit, which notification is by me herewith returned.

I further certify that on the fourteenth day of April, A. D. 1880, I was attended at the law office of J. M. & C. H. Krum, being rooms Nos. 4 & 5, at No. 307 Olive street, in the city of Saint Louis, in the eastern district of Missouri aforesaid, by Chester H. Krum, Esq., on the part of said plaintiff and by Nathaniel Myers, Esq., on the part of the said defendant, Joseph Rosenthal, and the witness Louis Temm, who was of sound mind and lawful age, and the witness
was by me cautioned and sworn to testify the truth, the whole
110 truth, and nothing but the truth, and was carefully examined,
and the deposition was by me reduced to writing in the presense of the witness, and from his statements, and after carefully reading the same to the witness he subscribed the same in my presence.

I further certify that on the fifteenth day of April, A. D. 1880, pursuant to adjournment I was attended at the place last aforesaid by Nathaniel Myers, Esq., on the part of the defendant aforesaid, and the said witness Louis Temm, who upon his oath aforesaid was carefully examined, and the deposition was by me reduced to writing in the presence of the witness and from his statements, and after carefully reading the same to the witness and from his statements, and after carefully reading the same to the witness he subscribed the same in my presence.

I further certify that upon the sixteenth day of April, A. D. 1880, pursuant to adjournment, I was attended at the place last aforesaid
by Chester H. Krum on the part of the plaintiff aforesaid and
111 by Nathaniel Myers on the part of the defendant aforesaid
and the witness Jno. Senour, who was of sound mind and lawful age, and the witness was by me cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and he was carefully examined, and the deposition was by me reduced to writing in the presence of the witness and from his statements, and after carefully reading the same to the witness he subscribed the same in my presence.

I further certify that upon the nineteenth day of April, 1880, pursuant to adjournment, I was attended at the place last aforesaid and by Nathaniel Myers on the part of the defendant aforesaid and the said witness John Senour, who upon his oath aforesaid was carefully examined, and the deposition was by me reduced to writing in the presence of the witness and from his statements, and after carefully reading the same to the witness he subscribed the same in my presence.

I further certify that upon the twenty-first day of April,
112 1880, pursuant to adjournment, I was attended at the place last aforesaid by Chester H. Krum on the part of the plaintiff aforesaid, and by Nathaniel Myers on the part of the defendant aforesaid, and the said witness Louis Temm and the witness Carl Hirsch, and the said witness Louis Temm on his oath aforesaid was carefully examined, and the deposition was by me reduced to writing in the presence of the witness and from his statements, and after carefully reading the same to the witness he subscribed the same in my presence; and the said witness Carl Hirsch, who was of sound mind and of lawful age, was by me cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and he was carefully examined and the deposition was by me reduced to writing in the presence of the witness and from his statements, and after carefully reading the same to the witness he subscribed the same in my presence.

I further certify that upon the twenty-third day of April, 1880, pursuant to adjournment I was attended at the place last
113 aforesaid by Chester H. Krum on the part of the plaintiff aforesaid, and by Nathaniel Myers on the part of the defendant aforesaid, and the witness Fred. Lipphardt, who was of sound mind and of lawful age, and the said witness was by me cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and he was carefully examined, and the deposition was by me reduced to writing in the presence of the witness and from his statements, and after carefully reading the same to the witness he subscribed the same in my presence.

I further certify that upon the first day of May, 1880, pursuant to adjournment, I was attended at the place last aforesaid by Chester H. Krum on the part of the plaintiff aforesaid, and by Nathaniel Myers on the part of defendant aforesaid, and by the witness Amos M. Thayer, who was of sound mind and lawful age, and the said witness was by me cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and he was carefully examined, and the deposition was by me carefully reduced to writing in the presence of the witness and from his state-
114 ments, and after carefully reading the same to the witness he subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of sealing up and directing the same, with the certificate of the reasons aforesaid for

taking said depositions, with my own hand to the court for which the same were taken. I herewith return a certain book and certain papers, the said book being marked by me Exhibit A, and bearing my signature and seal upon pages 102 and 123 therein, and the said papers being respectively marked by me Exhibit B, Exhibit C, and Exhibit D, and each bearing my signature and seal; and I certify that said book and said paper are identically the same book and papers referred to in said depositions as Exhibit A, Exhibit B, Exhibit C, and Exhibit D, and so identified by the witnesses.

And I do further certify that I am not of counsel nor attorney for either of the parties in said depositions and caption named, or in any way interested in the event of said cause named
115 in said caption.

In testimony whereof, I have hereunto set my hand and seal, this eighth day of May, in the year of our Lord one thousand eight hundred and eighty, and of the independence of the United States the one hundred and fourth.

[SEAL.] WALTER B. DOUGLAS,
Notary Public.

EXHIBIT B.

Annexed to foregoing depositions.

ST. LOUIS, *Dec.* 10, 1875.

Account sales—B. Rosenthal.

Aug.	31.	5 cases	lye		3.50	17	50
Sept.	8.	15	do	do	3.25	48	75
"	15.	15	do	do	3.50	52	50
"	27.	37	do	do	3.25	120	25
	1.	1	do	do bad order		1	75
		73					

Total, 73

Aug.	16.	To your own order,		1 keg soda			
Sept.	15.	Sold	5	do	do 3½	19	60
Oct.	20.	"	5	"	" 3¼	18	20
Dec.	9.	"	88	"	" @ 2.50 keg	220	00
		Total	99			$498	55

Aug.	3.	Charges—Drayage	4.50	
		Delivering same	3.50	
Dec.		Storage paid	23.78	
		Insurance	3.12	34 90
				$463 65

116 EXHIBIT C.

Annexed to foregoing depositions.

July 17.	By cash	$2,000	00
23.	do	3,000	00
24.	do	3,267	90
24.	do	1,962	56
26.	do	369	75
28.	do	4,422	03
31.	do	5,295	00
28.	do	2,500	00
Aug. 2.	do	937	00
23.	do	1,043	60
23.	do	202	16
		$25,000	00

EXHIBIT D.

Annexed to foregoing depositions.

OFFICE OF WESTERN FERTILIZER AND CHEMICAL WORKS,
No. 14 N. Main Street,

ST. LOUIS, *Jan'y 1st*, 1875.

This is to certify that the holder of this certificate has deposited with me twenty thousand dollars, and for the use of this money I hereby agree that whoever may hold this instrument shall become my partner to the extent of one-third ⅓ of the profits or losses of my auction and commission business at No. 313 North Main st., St. Louis, Mo., and shall be allowed to draw from my busi-
117 ness three hundred dollars per month, commencing from July 1, 1875, which shall continue as long as this agreement shall be in force, which amount shall be charged to expense acct., and the books in which my business is kept whenever either party shall desire to terminate this co-partnership a notice of at least three months shall be given.

(Signed) J. ROSENTHAL.

STATE OF MISSOURI, } ss.
COUNTY OF ST. LOUIS. }

I hereby certify that I have compared the above instrument with the original of which it is a copy, and that it is a correct copy thereof.

Given at St. Louis, Mo., this 29th July, A. D. 1876.

[SEAL.] (Signed) AMOS. M. THAYER,
Notary Public.

Testimony of Thomas Carneg, referred to and made part of Bill of Exceptions No. Five.

In the District Court of the United States for the Eastern District of Missouri.

118 IN THE MATTER OF THOMAS CARNEY, BANKRUPT. } In Bankruptcy.

EASTERN DISTRICT OF MISSOURI, *ss.*

At office, in St. Louis, in said District, on the 29th day of April, 1876.

I, Thomas Carney, the person declared a bankrupt under the petition for adjudication of bankruptcy, filed on the 20th day of October, 1875, do solemnly swear that I will make true answers to all such questions as may be proposed to me respecting all the property of the said bankrupt, and all dealings and transactions relating thereto, and will make a full and true disclosure of all that has been done with the said property, to the best of my knowledge, information, and belief.

THOS. CARNEY, *Deponent.*

Subscribed and sworn to before me, this 29th day of April, 1876.

(Signed) LUCIEN EATON,
Register in Bankruptcy.

In the District Court of the United States for the Eastern District of Missouri.

IN THE MATTER OF THOMAS CARNEY, BANKRUPT. }

119 Examination of bankrupt by the assignee before Lucien Eaton, register, in said district.

ST. LOUIS, MO., *April* 20, 1876.

Thomas Carney, being duly sworn, testified as follows:

Q. Where do you reside?

A. I reside in St. Louis.

Q. At what place in St. Louis?

A. I am boarding at the Lindell Hotel, sir.

Q. Are you in business at present?

A. I am not; no, sir.

Q. When did you cease doing business?

A. It was either the 10th or 12th of June, 1875; about that time.

Q. And you have not been in business since then?

A. I have not regular business. I have bought and sold a few goods after that up to some time in July.

Q. Were you in business at St. Louis when you ceased to do business?

124 Q. Is it among the papers delivered up to the marshal?

A. No, sir; it was an inventory taken on the blotter book, such as we have; we took an account of the stock, kept the stock from time to time in a book, and it is inventoried in that book.

Q. Where is that book now?

A. It must be somewhere about my office, or should be there, at any rate.

Q. That is one of your business books, is it?

A. Yes, sir. It is one of the books we had for taking stock in.

Q. Did you put it in your schedule?

A. I do not know whether it was or not; I could not say.

Q. Does it fall under the head of Day Book, Journal, Cash Book, or Ledger?

A. No, sir.

Q. Or Sales Book?

A. No, sir.

Q. Or Invoice Book?

A. Well, no, not particularly an Invoice Book; what we call an invoice book, is a book that we enter all Eastern invoices in. This was simply a blotter.

Q. It was not included in your schedules, was it?

125 A. I should not recollect from that list. No, sir; the book contained an inventory of stock on hand, first of July and first of January; such an inventory as a man will take in taking his stock every six months.

Q. Do you remember the day at which this inventory was taken?

A. It was concluded two or three days before the final sale. It was taken early in the month of June; it took some three or four days to do it.

Q. And you sold out these goods, at 75 cents on the invoice price, bought from Eastern houses?

A. Yes, sir; I think I made a very good sale, too.

Q. What did you do with the amount received from Rosenthal for these goods?

A. Well, I used it in paying a good many debts; for various purposes.

Q. What debts did you pay with it?

A. Eastern debts; debts falling due. Used some of it for speculation.

Q. What Eastern debts did you pay with it?

A. I could not tell you without looking at the books now. The books will show.

126 Q. Your books in possession of the marshal will show all that was used for that purpose?

A. Yes, sir; all that went for that purpose.

Q. And the balance of it, what did that go for?

A. Well, it went to a big loss.

Q. What loss was that?

A. Buying wheat.
Q. In this market?
A. No, sir.
Q. At what point?
A. Chicago.
Q. Did you buy it individually?
A. No, sir.
Q. From whom did you buy it?
A. I bought it through a man I went in partnership with; a man named Norris.
Q. What is his first name?
A. Joseph L.
Q. Does he reside there now?
A. No, sir; not that I know.
Q. Do you know where he does reside?
A. I do not know; he went to the Pacific post; from there went to California.
Q. Where was his office at the time you had this transaction with him?
A. He did not live here.
Q. Where did he live?
127 A. He lived in Ohio.
Q. At what point?
A. He lived in Cincinnati part of the time.
Q. Was he a permanent resident of Cincinnati?
A. He lived there some little time. I used to know him a good many years ago, when I lived there myself. He lived in northern Ohio at one time.
Q. At what point in northern Ohio?
A. He lived at Mount Vernon at one time, a great many years ago, however. He was at Cincinnati, or about there, some 20 odd years ago. He went down there pretty near the time I did.
Q. Did he live in Cincinnati after twenty years?
A. No, sir; he has been there, off and on, considerably.
Q. Where has he been in the meantime?
A. Well, I don't know; he was around many places; he was in the war at one time.
Q. Was he living in Chicago at the time you had these transactions there?
A. No, sir; he was not.
Q. Was he a resident in Chicago at that time?
128 A. No, sir; he was not.
Q. How then could he transact business there?
A. Well, he went there and wheat was selling at a dollar eleven to one twelve, fourteen and fifteen, and very suddenly jumped up from 80 odd cents up to that price, and there was a tremendous crop, and we made up our minds to see what we could do. I had made some money, in the earlier period of my life, in that sort of busi-

ness, and we thought by selling wheat short, at that time in June, at that price it would be a sure thing. If you recollect, however, the rains came. It rained here suddenly in June and spoiled the wheat, and wheat went up from a dollar eleven and twelve to one thirty in less than a week, and we had 500,000 bushels wheat between us, sold at a dollar nine to one fourteen and one fifteen, or somewhere along there, and the consequence was that we were sold out.

Q. Where did you have your wheat stored?

A. We didn't have it stored; it was sold short for August?

Q. Where did you have the wheat?

129 A. In the city of Chicago.

Q. With whom?

A. I don't know who bought it, I never was there.

Q. Did you have anything to do with the transaction yourself?

A. Nothing more than to furnish the money.

Q. Where did you meet Norris when you made this arrangement?

A. He came here.

Q. To whom did he operate through?

A. I don't know.

Q. Do you know how long he was in Chicago?

A. Not over ten days, I don't think.

Q. Between what periods?

A. I should say from about the 12 to somewhere about the 20th, or may be from the 15 of June to the 23d or 24. Somewhere along in that neighborhood, in June, 1875.

Q. Did you have any correspondence with him while he was there?

A. Yes, sir.

Q. What was his address while he was there?

A. I don't recollect. I think the letters will show. I don't recollect now.

Q. Was he staying at the hotel?

A. I don't know that even.

Q. Have you his letters?

130 A. I think I must have, sir.

Q. Did you deliver them up to the marshal?

A. I could not say whether those letters are among them or not. He got all the letters that were filed away. I could not answer about that, I did not look at the letters that the marshal got. He got all the letters that were filed away there.

Q. You give him some of your business letters, at least, did you?

A. I gave him all the business letters, I think.

Q. You think you gave him these?

A. I would not say, I don't know that, I did not examine any of the letters at all. As the letters came they were put in the drawer and filed away; the marshal got a large package of letters;

I did not deliver him the letters. I was not there when he got them, the young man in office delivered him the letters.

Q. What is his name?

A. Mr. Keeler.

Q. You have an office here now, have you?

A. I have an office with Mr. Keeler there. I was keep-
131 ing that office there with him. He is not in my employ. He was in the office when the marshal came there, while I was away. I got the books and papers under my direction to deliver them to him. They were put under Mr. Keeler's supervision to deliver them when he called for them.

Q. How long before you entered into these arrangements did Norris come to St. Louis? How long was he here before you entered into it?

A. He came here in the morning and went away in the evening.

Q. You made the arrangement with him during one day?

A. Yes, sir.

Q. When had you last seen him, before this day, when you made these arrangements?

A. Oh! I had seen him frequently in the East.

Q. When?

A. Well, I don't know. I could not call to mind when, but very close. The last time I was in New York, I met him in New York.

Q. As much as a year before?

A. Yes, sir, less than a year. I think it must have been in February, perhaps.

132 Q. Where was he doing business at the time he came here?

A. He was not in any special business.

Q. Where was he living at the time?

A. He came from Cincinnati here.

Q. Had he been living in Cincinnati?

A. Oh, yes; he had been there some time.

Q. He was living in Cincinnati when he came here, was he?

A. That is my understanding, that he was, and that that was his home.

Q. Did he come here on your invitation?

A. No, he did not. He came over here and called on me, and made the suggestion to me. I knew he had been doing something of the kind before, and he said there was big money in it, and I thought so too, and there would have been but for the storms.

Q. That was about the 12 or 15th of June that he was here, is it?

A. It was not far from that time, sir. I could not state definitely to the date.

Q. How much money did you pay into his hands, or did you furnish for this business?

A. Over 29 thousand dollars.

Q. You furnished to him?

A. Yes, sir.

133 Q. Do your books show any account of these transactions?

A. No, sir. Money charged to him, that is all, sir.

Q. The books did not show any of the transactions?

A. No. It had nothing to do with my business at all.

Q. Where was it that you gave him or remitted him this money—from what point?

A. I gave him considerable money here before he went away.

Q. How much?

A. I think I gave him five thousand dollars.

Q. In what form? In currency?

A. I think it was in money.

Q. Not in a check?

A. No, sir.

Q. Did you get this money out of bank, this five thousand dollars?

A. Mr. Rosenthal discounted it—some of his paper.

Q. Mr. Rosenthal paid some of his paper to you?

A. Yes, sir. I may have got some out of a bank too, I would not say about that positively, at that time.

Q. In what form was the balance of this 29 thousand dol-

134 lars given to Norris?

A. Well, some I sent to him, I sent some to him by draft, and some I sent by currency, and I paid him some on his return when he came back from Chicago here.

Q. Do you remember how much you sent him by draft?

A. No; I do not now.

Q. Do you remember on what points these drafts were drawn?

A. I presume all on New York.

Q. Through what bank did you obtain your drafts?

A. Bartholow, Lewis & Co.

Q. Payable to the order of Mr. Norris?

A. To the order of myself; drafts that I got, that I remember, were made payable to my order.

Q. And endorsed to the order of Joseph L. Norris?

A. Well, I could not say, I presume so, I could not say that positively. That is the usual way.

Q. You don't remember whether you endorsed to his order or not?

A. I don't recollect; of course I could not swear as to whom they were endorsed.

Q. You say you made him some remittances in currency?

A. Yes, sir.

135 Q. In what way, through what source did you make the remittances in currency?

A. Well, I sent him, I think, one package by express.

Q. To Chicago?

A. That is my recollection.
Q. By what express?
A. I could not state that now.
Q. From this city?
A. Yes, sir.
Q. You sent it to him direct?
A. Yes, sir; that is my recollection, at least I sent it to him direct, or the one in which he ordered it.
Q. Do you know whether you did send it to him or not?
A. No; I could not state positively about that.
Q. Did he ever order you to send it in any other way than direct?
A. Well, I could not state that; he would telegraph, you know. He would telegraph for so much, that we were short, that the market was advancing, and he would telegraph for so much money.
Q. Did you preserve his telegrams?
A. Well, I could not say whether I did or not.
136 Q. What did you do with them?
A. I carried them in my pocket.
Q. Did you place them among your business letters?
A. I don't think I did, sir.
Q. Did you deliver them up to the marshal?
A. No, sir; I don't think I did.
Q. Will you deliver them to the marshal?
A. If I have them I will. All private telegrams and private letters of course I never file them with my business letters. I was not expecting anything of the kind; I don't believe I have got them; if I have got them I will give them up with the greatest pleasure in the world; I don't know what the marshal has got in the way of letters.
Q. Then your books did not show these wheat transactions that you were engaged in?
A. Oh! no, sir.
Q. Do they show correctly the times when you drew out these moneys to remit to your agent?
A. I don't think they do, sir.
Q. Did you make any memorandum or entry?
137 A. I might take it in a private memorandum book of my own, sir.
Q. These transactions?
A. Yes, sir.
Q. Have you delivered that up to the marshal?
A. I don't think I have.
Q. Have you it in your possession?
A. I have not it with me here now.
Q. Have you it in your possession?
A. I presume I have.
Q. Will you deliver that up?

A. I will show it to you with pleasure.

Q. Besides this amount received from Rosenthal for the stock of goods that you had on hand, did you have any other money or estates at the time when you stopped business on the 10th or 12th of June, 1875?

A. Well, I had my bills receivable from old business.

Q. Were these entered on your books?

A. Oh, yes, sir.

Q. Has the disposition of those been entered on your books?

A. Yes, sir.

Q. The subsequent disposition of them?

A. Yes, sir; a perfect history of them.

138 Q. Had you sold any goods in the lump before this sale to Rosenthal?

A. No, sir; only the regular business, you know.

Q. All your sales before that had been to customers in the regular course of business?

A. Yes, sir; except some goods that I had sold at auction.

Q. To whom?

A. I will go back and explain that I had a fire in the fall before that, in August previous, 1874; I had a fire, and a great deal of water, and my stock was terribly damaged.

Q. Was that stock boots and shoes?

A. It was a stock of boots and shoes; it was fearfully damaged, and I sold all these goods. I speak now from my best recollection. I sold some 40 odd thousand at auction; they were so badly damaged that they were not fit to go into any jobbing trade. When boots are wet they get very hard. In the spring I expected to find the spring and summer goods in a very good condition, but

139 I found them in a terrible condition; very hard, almost unsaleable. They could not be sold at private sale unless a party here and there wanted to buy them, and I had to sell them at auction. Early in the spring, learning how the stock was, I had Rosenthal sell them, as he had done an auction business for me before, and very satisfactory too, and he sold them at auction the best he could. Of couse he had to sweeten up the stock a little to make very desirable.

Q. You sold these goods through Rosenthal?

A. Yes, sir.

Q. What time di. you make that first auction sale?

A. The fire occurred as I remember it now near the middle of August, and then it took I suppose some 10 days or two weeks before the damage was adjusted by the appraiser, and then soon after that as it could be done it was done; I suppose somewhere on the twentieth of August.

Q. That you had this auction sale?

A. Yes, sir; somewhere between the 20th and 25th of August, I should say to the best of my knowledge.

140 Q. Did you have one sale or more than one sale?

A. I had two sales.

Q. Both in that month?

A. Yes, sir; I should think they were in the neighborhood of a week apart; took the worst goods first, and as soon as we could made the other sale. In the spring I come to find that almost all the stock was in a fearful damaged condition, and a frightful loss was sustained on it too. That was in the spring of 1875.

Q. You had on hand then part of the goods of 1874?

A. Yes, sir; I think my inventory show above 24 to 25 thousand dollars that I had on hand. That is my recollection now of the inventory on the first of January, 1875.

Q. A part of the goods included in the sale of 1875 were these damaged goods in the year before?

A. I began to sell them along early in the spring, as soon as I discovered their condition; part of them were there and part were not; they were mixed up.

Q. Then you added of the stock you had on hand at that time?

141 A. Yes; I added new goods in the spring to this stock. These are the goods I owed for now, chiefly.

Q. With what view did you close out all your goods?

A. From the fact that I discovered that I was not a shoe merchant; that I was not adapted to the trade and did not understand it well enough to compete with the trade here in the city.

Q. How long had you been in that business?

A. I went into business in July, 1873, with William E. Stover. I had no knowledge of the business at that time at all, but I supposed I had a partner who had when I went in with him. I went in to take care of the office, and he attend to the shoe business.

Q. Did you notify your creditors of your intended sale?

A. I did not; I notified them of what I had done. I will qualify that in one way—when you put it creditors. A gentleman, Mr. Pomeroy was here. Mr. Pomeroy, of Boston; he was an old acquaintance of mine, and I talked to him about it; at last

142 advised me to sell, and said if I got about that price I would be selling them well, as I could replace them with new goods at the same price; that goods had declined so that it would be a good sale. He spoke to me about it, and, I think, one other person that I cannot call to mind just now.

Q. What Pomeroy was that?

A. James P.

Q. Did you tell him you intended to replace them with new goods?

A. Oh, no; I asked him what he thought I ought to get for the stock. He said he could buy goods for seventy-five cents on the dollar; that he would undertake to replace them with new goods at that rate. He said the decline in shoes had been very great.

Q. Now you say you had an auction sale before that in August, 1874?

A. Yes, sir.

Q. What amount of goods did you dispose of in that way in 1874?

A. My recollection is, about 40 thousand.

Q. That is the amount received from the sales?

A. Well, I don't know that *that* they netted me that amount, but that is the amount of the inventory that was turned over to the
143 auction; that is my recollection; the books will show.

Q. Through whom did you make that first sale?

A. Joseph Rosenthal.

Q. For that you received cash?

A. Yes, sir; the same as cash. Ten days after the sale.

Q. After you had sold out your stock in June, in what business, if any, did you engage?

A. My purpose was to go into the grocery business, which was a business I understood, but I didn't do it; I bought a few things.

Q. What time did you form this purpose?

As soon as I quit the shoe business I notified all my customers of what I was going to do and what my purpose was.

Q. Was that after or before you had this transaction in Chicago?

A. I think I notified them before; I think so. Before the close of it, any rate.

Q. Then it was within 5 or 6 days aftr the 10th or 12th day of June?

A. Well, if you will allow me, I will make this statement: I don't know that it is proper, but then I want you to under-
144 stand it as you go along; I notified every creditor I had personally, and those that I did not, I would request, may be one or two parties, to notify some of his neighbor what I had done; that I was going back to the old business that I better understood, and that I wanted them to have the same confidence in me that they ever had, for I expected to be able to pay my debts, but they commenced right away raising my paper and putting it on the market at 30 and 60 cents on the dollar, so that, when I undertook to apply for credit in my old business, my credit was gone. They began to ask: "What is the matter; Carney used to be good; what is the matter with him?" and of course I had credit to go into bussness, and that made me a little more discouraged, and I thought I had a chance to make some money and pay those gentlemen off, and get back into business, but it was a mistake that I made.

Q. It was within the first four or five days after the 10th or 12th of June that you formed this purpose?

A. That was my recollection, as I told you; I could not
145 state exactly without refreshing myself with memorandum.

Q. Did you at once notify them of your purpose of going into the grocery business?

A. Yes, sir; right away.

Q. Did you rent a store for that purpose?

A. I rented an office, and was looking for a store; I had several in prospect, and went to several parties about it.

Q. To whom did you apply for a store?

A. Well, I applied to Mr. Barnes here for one. He used to be a bank president here. An old gentleman. He lives out on Grand Avenue, near Washington, I think. He used to be president of some of these Missouri banks at an early day. I applied to him, and looked at three or four other stores. I went to two or three parties here who were real estate agents, who had stores for rent; I would have rented a store, but there were no stores of the size I wanted. They were all larger stores and more expensive than I wanted to get. That was the trouble with Barnes' store.
146 I made him two or three offers, but it was a larger store than I wanted, and a higher price than I wanted to pay. I tried to get him to let me have the lower part and somebody else for the upper part, but I could not do that.

Q. When did you give up this intention to go into the grocery business?

A. When I made this loss and when I found I didn't have any credit.

Q. You made this loss, you say, between the 10th and 20th of June?

A. No, sir; it was later than that in June; of course the loss don't occur until a man is sold out. The loss didn't occur until some time between the 20th and 30th.

Q. After that you gave up the idea of going into the grocery business, didn't you?

A. Well, of course I was a good deal discouraged about it; I could not see my way clear to do it.

Q. Did you give up the intention of going into business at that time?

A. Well, I could not say as to that; I never gave up the intention of going into business; I expect to be in business as long as I live.

Q. Did you give up, at that time, your intention to go
147 into the grocery business?

A. I could not now refresh my memory as to what my intentions were at that moment of time, but I know very soon afterwards I did, for I found I could not do it.

Q. For the reason of this loss?

A. This loss, and that my credit was gone. These people put my paper into market and offered it at such prices that it scared everybody from offering any credit or selling to me.

Q. Did you buy any groceries for the purpose of going into that business?

A. Yes, sir, I did; I bought a few things.

Q. From whom were your purchases made to go into the grocery business?

A. Well, I bought some lye of the Pennsylvania Salt Company, and some of the Concentrated Lye Company, and I bought some whiskey of Gaff and Company, of Cincinnati, Aurora.

Q. What time did you that whiskey?

A. Well, I could not call to mind now; I think it was some time in June, however.

148 Q. How much was in that purchase?

A. That purchase amounted, I think, to about 58 hundred dollars, if I recollect right.

Q. How many barrels of whiskey were purchased?

A. One hundred and fifty.

Q. That was from T. & J. W. Gaff & Co.?

A. Yes, sir.

Q. What did you do with the whiskey you purchased from them?

A. I sold it in New Orleans.

Q. How long after the purchase was made?

A. I could not state that definitely, but I should think in the neighborhood of about six weeks. That would be the best of my recollection without going to the books or have reference to the papers.

Q. Who did you send it to in New Orleans?

A. I don't recollect the parties named; Newman & Company, I think, made the sale for me.

Where do they do business?

A. In New Orleans.

Q. You did not sell it through any parties here?

149 A. No, sir; oh, no; it was at the time when every whiskey man here was seized, and they were making a big raid, and nobody wanted to buy any whiskey. Nobody would look at it here, and all were afraid to touch it. And when I found that I could not go into the grocery business, I looked around for a market, and New Orleans was suggested as the best place to dispose of it. It was a brand well known, and all I had to do was to state the brand, and I had a market for it. I either wrote or telegraphed I wanted so much, but I had an offer for it, and it was an offer that just about let me out on it.

Q. To whom did you telegraph?

A. My recollection is it was Newman; I think a man named Dreyfus was the party who bought it, now I come to think of it; I got an order and accepted it, and when I came to ship it I got another telegram that it had fallen five cents a gallon, and that paid me a little less.

Q. Did you offer the whiskey by letter or telegram?

150 A. Well, I should say from recollection that I first wrote, though it may have been by telegraph, but my recollection is it was by letter at first; that is the best of my recollection.

Q. Do you recollect the date of the sale?

A. I do not; no, sir.

Q. You do not recollect the date of the purchase?

A. I do not; that is not to be anyways exact; I could not come within, perhaps, within two weeks of the time.

Q. Did yon sell it for cash or on time?

A. I sold it for cash; at least I got the money for it; Mr. Newman remitted me the money for it, so that I suppose from that it must have been shipped to him.

Q. Did you buy it for cash or on time?

A. I paid one-half cash and the other half was on time.

Q. The proceeds were about 58 hundred dollars, you say?

A. That is what I paid for it; that is my recollection of it.

Q. Were the proceeds less or more than you paid for it?

A. The proceeds were less.

Q. By how much?

151 A. Well, I could not state positively without looking at the books; something less, however.

Q. Are the transactions entered on your books?

A. I think they are; I think so,

Q. Are you sure?

A. Well, I aint positive; I know I have got all the bills and everything of that kind there; what I did in that way did not go into my shoe book business.

Q. What books did you put those transactions in?

A. I kept that on a memorandum until I would open regular books.

Q. Did you ever open books of your grocery business?

A. I think not, sir; no, sir; I did not open any books.

Q. In what form did you keep the transactions that took place in the grocery business?

A. I kept all the invoices.

Q. You simply kept the invoices?

A. Yes, sir; and made the entries, of course, of the notes on my bill-book.

Q. You made entries of the notes that you gave to bills payable on your bills payable book that you had kept in your shoe business?

A. Yes, sir.

152 Q. And that you have given up to the marshal?

A. Yes, sir.

Q. The cash that you had paid, where did you make entries of that?

A. That is entered on the cash-book; its on these books there; all on these books.

Q. And the cash that you received?

A. They are all on these books.

Q. The disposition of the cash that you received, where did you make the entries of that?

A. Well, it was kept in that way; for instance, all these matters were charged to my individual account on the shoe books, and credited to me when I paid it in money; for instance, this whiskey money was charged to me, and the money paid in was credited to me.

Q. Is that the only entry charge to you of so much money?

A. Oh, no; there is a great many entries.

Q. I mean where you paid money for whiskey?

A. No; other things too.

Q. This whiskey that you bought of Gaff & Company—the money that you paid in cash was the only entry in regard to
153 the payment of that money, and charged to you, of that money on the books.

A. Yes, sir. That is all the entry that appears on these shoe books.

Q. Does it show for what it was paid out? Do the books show that?

A. I presume it does; when you come to look at the books, you will find the book-keeper has got everything written plain, with the explanation to every entry made there in fine writing; I think you will find it so.

Q. Your books show, do they, the disposition of the money that you got from Newman for this whiskey?

A. I think so.

Q. What disposition did you make of the money you got from Newman for this whiskey?

A. I used it in the payment of debts.

Q. Used it to pay your debts?

A. Yes, sir.

Q. Do you recollect what debts?

A. No; I could not state now.

Q. Well, your books will show the receipt of this money by you, and the amount of it, will they?

A. I think so, sir.

Q. And to whom you paid it?

154 A. I think so. That is, they will show receipts and disbursements. The books will show that, of course.

Q. Then the transactions were kept on your boot and shoe books with them?

A. I think so. That is, they will show receipts and disbursements. The books will show that, of course.

Q. Then the transactions were kept on your boot and shoe books with them?

A. So far as the money was concerned. The money, part of it, was on the cash book. The merchandise was not entered on the merchandise ledger, you know. It was a journal, but the cash part of it went through the books.

Q. Do you remember the time when you purchased these goods from the Pennsylvania Salt Company?

A. No; I could not give the dates.
Q. Those goods were shipped to you, were they?
A. The salt that I bought from the salt compamy; yes, sir.
Q. Did they go into your hands?
A. Yes, sir.
Q. Where did you keep them stored?
A. I kept them stored over in Smith's store.
Q. The same place that you had your office?
155 A. Yes, sir; right under.
Q. What disposition did you make of that salt?
A. I sold it.
Q. In the lump?
A. Yes, sir.
Q. To whom did you sell that?
A. To a broker named Dolberg.
Q. Where does he do business?
A. He did business in the city here.
Q. Did you sell it for cash?
A. Yes, sir.
Q. How long after you bought it?
A. Well, I could not state that; I don't recollect; somewhere from fifteen to twenty-five days, I believe.
Q. Can you state whether you bought that salt prior or subsequent to the first day of July, 1875?
A. I could not from recollection.
Q. Did you pay for the salt?
A. No, sir.
Q. Bought it on credit?
A. Yes, sir.
Q. What disposition did you make of the cash that you received?
A. The same as any other cash; it went into to the cash book, and was disposed as the books will show.
Q. Does the cash book show so much cash received from
156 the sale of that salt?
A. I think the cash book gives me a credit.
Q. So much money proceeds of that salt?
A. I could not state how it is worded in the cash book, but the proceeds was placed to my credit on the cash book.
Q. What use was made of that money?
A. The same as any other; I used it in the payment of debts.
Q. Do your books show the debts that you paid?
A. Some of them it does, sir, and some it does not.
Q. It does not show some?
A. No, sir.
Q. Where did you keep a memorandum of those that were not put upon your books?
A. Well, I owed some debts; Carney, Fenelon & Company,

when they went out of business, owing some debts which fell to my lot to pay, as I was the only surviving responsible party, and I had some of these debts. I paid some individual debts of my own to parties who had money with me; when we were up in Kansas
157 a great many parties deposited with us, and we kept it with us down here.

Q. Do you mean to say you used some of this money that was proceeds of this sale for paying some of those debts?

A. No; I did not say that.

Q. You don't know for what debts you used it?

A. I could not say now.

Q. Who has the books of Carney, Fenelon and Company?

A. I don't know.

Q. What was the name of that party that you had transactions with in regard to the wheat?

A. Joseph L. Norris.

Q. You think he was in Chicago about a week or ten days in regard to this transaction?

A. Yes, sir; I heard from him there. He must have been there as long *as long* as that, I should think. I know he was very quick done.

Q. Did you write to him, while he was there, in regard to those transactions?

A. Yes, sir.

Q. Did you preserve copies of your letters?

A. No, sir.

158 Q. You did not keep them in your business-letter book?

A. No, sir; I did not. It was a private affair that I did not care to have known. It was a matter that would do a business man no special good. If he was successful, then he would not care; but if he was not, he would not care about it being known.

Q. Did he render any statements of account of these transactions?

A. He came down and rendered to me in person.

Q. Did he give you any written statement of account?

A. I think some of his letters discloses some of it.

Q. And those letters, you don't know whether you have, or whether you turned them over to the marshal?

A. I could not state positively. It does not require much of a statement. In every broker's office in town, almost, they have a telegraph indicator, and you can see for yourself what the market is every day, and every hour, and every five minutes in the day, and it don't take much calculation to tell what your profits and losses are.

Q. Yes; but he had to state when he sold, how much he sold, didn't he?

159 A. Oh, yes; I have got all of that, certainly.

Q. And when he bought, he would state how much he bought?

A. Oh, yes; I have got all that. I have the minutes of that.

Q. And you furnished all the money for the transaction?

A. No; only half of it. Only my share, that is all. My share in proportion to the interest.

Q. You cannot recollect whether he wrote to you from a hotel or private residence?

A. No; I cannot recollect how it was dated. Whether it was dated from his office where he attended his business, or whether it was from a hotel. I cannot recollect.

Q. You can recollect to what address in Chicago you directed your letters to him?

A. No; I think very likely his letters will show that. I think I can furnish that information for you.

Q. Where does J. C. Audenreid reside?

A. He lived here; he was on General Sherman's staff; he is now in Washington, I suppose; I think he went with Sherman to

Washington, I suppose; I think he went with Sherman to
160 Washington. In fact, he called on me just a day or two before he went there.

Q. Was this money loaned?

A. Yes, sir.

Q. I see it marked here, contracted in February, 1874.

A. That was the time that money was borrowed, I suppose, on Papin Avenue property. I think it was the 17th of February, 1874, or the 14th; whatever it is, I won't be positive; the papers will show that better than my recollection.

Q. A loan was made of ten thousand dollars?

A. Ten thousand dollars.

Q. Made originally by him to you?

A. I made the loan; I did not know who it was until last fall. I made it originally through Stagg and Brothers here, but I did not know who the parties were until some time last winter, when I think they told me who it was.

Q. It appears that there is a second mortgage to Joseph Rosenthal for 6,543 dollars.

A. Yes, sir.

Q. When was that mortgage made?

(Witness. Don't that show?)

Counsel. It does not.

A. Well, that was either June or July; I would not state
161 which; I got some of that money of him.

Q. In what year?

A. 1875. I got that money to fix up those matters.

Q. What was the consideration of that mortgage?

A. Six thousand dollars, currency. That must be an interest note that he puts up there, because the mortgage is only for six thousand dollars. It was for an even sum of six thousand dollars, and then there was semi-annual notes.

Q. It was for money loaned, was it?
A. Yes, sir.
Q. Through whom did you receive the money?
A. I received it from Rosenthal himself.
Q. When he was here in St. Louis?
A. Yes, sir.
Q. In what form?
A. In currency.
Q. You received it about the time when the mortgage was given, did you?
A. The very day—the very day that I delivered the mortgage to him. Let me see about that; my recollection is now, that I got that by a check on the State Savings Association; I got that from him by a check; that is my recollection.
162 Q. That was not a part of the money that came from the sale of your stock?
A. Oh, no, not at all.
Q. Was this over and above the money that you received from him for the sale of your boots and shoes?
A. Oh, yes.
Q. What disposition did you make of this six thousand dollars?
A. Well, I could not state minutely; I know that I owed some money to Bartholow, Lewis and Company. I know that I was overdrawn, I had overdrawn my account; I gave him some sort of bills payable or bills receivable for it to make that account good there; some went for other debts, I suppose.
Q. Did you use part of it in paying Bartholow, Lewis and Company?
A. Well, I could not state that, for I could not tell just exactly what my actual condition was without looking at the books.
Q. Do your books show the disposition you made of the six thousand dollars?
A. Well, I don't know; I remember I paid James L.
163 Byers; I owed him five thousand dollars borrowed money; I owed him some at that time; I had been paying him as he drew on me, a thousand dollars at a time. I owed some attorney's fees, that I paid.
Q. Did you pay part of this money to James L. Byers?
A. Well, I could not say; I paid him somewheres about that time.
Q. Who is James L. Byers?
A. A gentleman that lived in Leavenworth, Kansas.
Q. What is his business?
A. Well, he is a sort of real estate speculator; he used to be a trader and merchant at one time, but he is not in that business now; he is in the real estate business.
Q. From what did your indebtedness to him arise?
A. Borrowed money.

Q. Did he hold your note?

A. Yes, sir.

Q. Has he since returned it to you?

A. I don't think he has; there is a little sort of dispute about the amount of interest; I think I have overpaid him some few dollars, and he thinks I have not paid him quite enough.

164 There is some question of ten or fifteen dollars; I don't think he has given me the note.

Q. When was the last payment that you made to Bartholow, Lewis and Company?

A. Well, I couldn't state that from recollection.

Q. Do your books show?

A. Yes, sir.

Q. Did you make any later than July?

A. Oh, I have kept an account with Bartholow, Lewis and Company right along; I have kept my usual account with them, I presume, for two years; I should think a year and a half anyhow; I mean since I was in the shoe business; I used to keep an account with him a long time before that, and I have kept an account with him about a year and a half since I have been in the shoe trade. That would be my recollection without being exact. They had collaterals for all the money I owed them.

Q. What was your financial condition in February, 1875?

A. Well, I thought it was very good; I thought it was reasonably fair at that time, sir.

165 Q. Were you in a solvent condition at that time?

A. I thought so, sir.

Q. Were you as a matter of fact?

A. Yes, I think I was; oh, yes. Oh, Lord! yes; a good deal more than solvent; that is to say, if what I had then had turned out to be worth anything, as I supposed it was at that time.

Q. What was your condition in the latter end of May or first of June, 1875?

A. Well, I thought I was very solvent then on the first of June.

Q. What was it in the latter part of May?

A. I thought I was very solvent then on the first of June.

Q. What was it in the latter part of May?

A. I thought I was very solvent then.

Q. Were you solvent then?

A. Yes, sir; I was to the best of my knowledge at that time.

Q. What property did you have then that you did not have along towards the 20th of June?

A. Well, at that time I had somewhere about 38 thousand dollars of bonds—railroad bonds—that I thought were worth something.

166 Q. You had them in the latter end of May and June?

A. Yes, sir; that is my recollection now. I had them last spring about that time; not far from that time, and I had considerable railroad stock that I thought were worth something.

Q. You had them in the latter end of May and June?

A. Yes, sir, that is my recollection now. I had them last spring about that time; not far from that time, and I had considerable railroad stock that I thought was worth something.

Q. Did you have the stock in the latter part of May?

A. That is my recollection of it.

Q. Did you have it on the 22d of May?

A. I think so.

Q. What railroad?

A. The Little Rock and Fort Smith Railroad.

Q. How much stock did you own?

A. Well, something over a hundred thousand of preferred and common stock together.

Q. What was the market value of that stock at that time?

167 A. Well, it hadn't any special market value; I had something in the neighborhood of forty thousand dollars, between thirty-five and forty thousand dollars of land-grant bonds of the first mortgage bonds of the road.

Q. And besides that a hundred thousand dollars of stock?

As much as that, I should think, in round numbers.

Q. Was there any sale for the stock at that time?

A. No, sir.

Q. Could it be sold?

A. Well, I don't know; no, I suppose not at that time. There was a good sale for the stock at one time.

Q. How long before that?

A. Well, a couple of years; the railroad had been hanging along a good long while, and got into a sort of difficulty.

Q. What was the financial condition of the road at this time, in May, 1875?

A. Well, it was bad; I don't know anything about it, however. The road was sold out.

Q. What time was the road sold out?

A. I don't recollect; it was sold out some time last spring, if I recollect aright.

Q. Was it before or after May?

168 A. I should say it was before May. That is my recollection now. I was not a director in the road, and never saw the Arkansas papers, and the first information I had of it was, I think, when some gentleman who passed through here on his way to Little Rock called on me and said he understood I had some stock and bonds in the road, and he came to give me an option which he thought might save some of the money.

Q. Who was it?

A. Well, I don't recollect; I have got his letters, but I don't remember his name. He claimed to be the new president of the road, of this new organization that they had gotten up; I was going to say it was Parsons, but that is not quite the name.

Q. How long had you owned this stock?
A. Well, I should say from four to five years.
Q. What did you do with it finally?
A. I surrendered it up; it was worthless. I gave it to my mother-in-law; I owed her some money. I told her that if she chose
169 to advance the money she could get bonds by paying sixty-five cents on the dollar for the bonds, that is if she chose to do that she could get some for bonds.
Q. You did owe her money?
A. Yes, sir.
Q. What time was this? Did you pay her?
A. Yes, sir.
Q. That was after May?
A. No; I gave her this, I think, some time either in May or June; I don't remember which.
Q. You owed her at that time still?
A. Yes, sir.
Q. You gave her this in payment of her debt?
A. She could make what she could out of it.
Q. The road, before that, had been sold out, had it?
A. Yes, sir.
Q. What were those bonds worth? Were they first or second mortgage bonds?
A. These bonds that I had at that time were first mortgage bonds of the road and land grant bonds. That road, if you remember, had a land grant, or ten sections to the mile, and there was a mortgage given on the land, and the first mortgage on the road.
170 Q. And you had forty-five thousand of them?
A. No; I had between thirty-five and forty thousand of them. That is, I had in my possession; you understand it. I had in my possession fifteen of them only, and the balance were in 'escro' in the Union Trust Company in New York. There were parties, Mr. Wheeler and a man named Webb, and J. P. Robinson, who was connected with this Atlantic and Pacific road, and several others. Our bonds were in escro, and we could only get out the bonds as fast as the road was completed, and we were only entitled to the dividend on what we had at that time.
Q. Did you ever get the others?
A. No, sir; never got them.
Q. They are still in escro, are they?
A. They are there, but there is nobody to take them out.
Q. Was the road sold under this first mortgage?
A. The road was sold for a hundred thousand dollars.
Q. Under the first mortgage?
A. I presume so; of course I could not say; I don't recollect.
Q. How many bonds did they have out?
171 A. Several millions.

Q. Did you ever get any dividend on this fifteen thousand that you have?

A. I have one dividend.

Q. What percentage?

A. They were six per cent. bonds.

Q. You mean one payment of interest?

A. Yes.

Q. I mean when the road was sold?

A. Oh, no; no, sir.

Q. Then you never realized anything from this?

A. No, sir; it would only amount to about fifteen cents; I suppose that is all they would amount to.

Q. Did these bonds have any market value in May or June, 1875?

A. No; they did not; I don't know that they had; of course we felt secure from the fact that we had all the lands. Here was the first mortgage upon these lands; they did not know of any way of getting done with it than to sell it out. I was very much astonished when the facts became known that it was sold out. I have heard that there are some parties contesting the sale.

Q. Was there any other property that you had in May, 1875, that you did not have in June and July?

172 A. Yes; I had some bonds in Kansas.

Q. Where were those situated?

A. They were scattered around; some in Miami County and some in Franklin, and some in Osage.

Q. In your own name?

A. Yes, sir; they were.

Q. What became of those subsequently?

A. I sold them.

Q. When did you sell them?

A. I sold them last June.

Q. For cash?

A. Yes, sir.

Q. Who was the purchaser?

A. John McKee, of Leavenworth.

Q. What was the amount realized from them?

A. I think five thousand dollars.

Q. That transaction was entered on your books, was it?

A. No, sir.

Q. Was the receipt of the money entered on your books?

A. No, sir.

Q. Or the disbursement of it?

A. No, sir.

Q. Sold all the property?

A. I sold it to pay some debts that I owed there in Kansas.

Q. To whom were those debts due?

173 A. Well, I owed Stellings and Fenelow, attorneys; their bills showed nearly eleven thousand dollars for the busi-

ness they had done for me individually and for the business they had done for my firm. Of course they had payments along from time to time, but I settled up with them in full some time, I think, in June; it was either in June or the forepart of July; I have got the bills to show for themselves; I could not tell exactly.

Q. Were those transactions entered on your books?

A. No; I don't think they are.

Q. Did you have another book on which you kept these private transactions?

A. Oh, that was just like I would employ you to do some business for me as attorney, which would not go into my business at all; you would bring in a bill and I would pay you and charge it, if I got it out of the firm, but it would not go on my books at all. If I drew the money out of the house, the money would be charged to me.

174 Q. Did you have a private settlement of books on which you kept these transactions?

A. No, sir.

Q. Do your books show the bills payable—sums due you when you stopped business in June, 1875?

A. Yes, sir; that is to say, the ledger will show it; of course we did not get notes for anything like the amount due us, but the ledger will show all the accounts that were due us.

Q. And what collections you made on them?

A. Yes, sir; that will all show.

Q. What was the amount of your liabilities on the 22d day of May, 1875?

A. I could not state what it was.

Q. What was the amount of your assets?

A. I could not state that either. In my statement in regard to those railroad bonds, I should have said fifteen thousand land grant bonds and three thousand of first mortgage bonds instead of fifteen thousand first mortgage bonds.

175 At this point the examination was adjourned until Thursday, May 11, at 3 o'clock P. M.

ST. LOUIS, *May* 11, 1876.

The examination of Thomas Carney was this day resumed as follows:

Q. This place, now kept by C. O. Dutcher, how long have you owned that; it is put down in the schedule as being worth twenty-four thousand.

A. I think it was 1871 that I purchased that.

Q. Do you remember what the purchase-price was?

A. The purchase-price at auction was twenty-one thousand five hundred dollars; that is what I bought it for.

Q. Cash?

A. The same as cash; it was a judgment against him for a por-

tion of it, and the balance was cash. At the time I bought it Mr. Sharp, of Sharp and Broadhead, offered to give me twenty-two thousand five hundred dollars for it when I took it, and before I had the deed made to me, I had been offered twenty-five thousand for it since, and have refused it.

176 Q. By whom were you offered twenty-five thousand?

A. I don't recollect the man's name now; it was through one of those real estate men here in town; that was in 1873. My recollection, that it was Bentable that got me the customer; that is my recollection about it.

Q. This piece of land, in Wahausee County, is that in town?

A. It is about six miles from the county seat.

Q. What sort of land is it?

A. A very fine piece of land.

Q. Is it under cultivation?

A. No, it is not, but it's joined all around; it's land ordinarily worth ten dollars an acre; it's worth six dollars now, I should think, at least.

Q. No incumbrance on it?

A. None in the world; taxes all paid and everything all straight and square. Burlingame is the county seat, a very nice town close o the Atchison and Sante Fé Railroad.

Q. This piece of land in the County of Kaufmann, Texas, valued at two thousand dollars, did you ever see the land?

177 A. I never did.

Q. When and in what way did you purchase it?

A. I had to take it for a debt. Mr. Keeler, my agent, saw the land. He says it's a very cheap piece of property at that price.

Q. This note for forty-four hundred dollars of James Gormly, of Virginia City; what about that?

A. I believe that it is a good note.

Q. Does he reside there now?

A. Yes, sir.

Q. Do you know whether he is in business?

A. He is assistant sheriff of the county now; he is a miner. He used to buy goods enough to run the mine. He has got an interest in his mine yet.

Q. This note of Ogle P. L. Lamman in New York; is that in New York city?

A. No, sir; he is somewhere in the state. He died a short time ago. He left some considerable estate, I understand.

Q. What was that for?

A. That was for endorsement.

Q. You had endorsed for him?

A. I had endorsed for him.

Q. And paid it?

178 A. I had to pay it.

Q. How old is that note?

A. I should think that it was two years old at least.

Q. Do you know where he lives?

A. I don't know his place. I gave it to a man by the name of Huchins, of Lawrence—gave the note for collection.

Q. Has he got it now?

A. No, I have got it wrong; I sent to him and he returned it. He was willing to take it, because he was attorney for Lammon. That is the way that was. Lammon was a very old personal friend of mine years ago, and he is said to have considerable of an estate in Michigan in timber land.

Q. At what point in Michigan?

A. That I could not tell you now without referring to some old correspondence on that subject. I gave that claim to Stellings and Fenelon, of Leavenworth; they are attorneys there.

Q. Have they got the note now?

A. I presume so; I gave it to them, and they said they sent it to some of their correspondents, but to whom I don't know.

Q. Note of Frank and Sickle, of Montana Territory; what is that worth?

179 A. I don't believe it is worth a great deal.

Q. Where did they live in Montana?

A. Helena; I have not heard from Sickle since he was here about two years ago. I never could find anything that I could make my money out of it. He always promised well; he was an old Leavenworth man; I used to know him in Leavenworth.

Q. Where is that note?

A. I think I had it, but gave it to the marshal.

Q. Here are thirty-six shares of the Brooklyn Fire Insurance Company; do you know what that is worth?

A. It cost me twelve thousand dollars in money.

Q. Do you know whether it is worth anything now?

A. Well, I know they have got a big property there—big estate, and they have not paid many dividends lately.

Q. Is the concern doing business?

A. I understand so. I will tell you who can tell you all about that; that is Thomas T. Buckley, one of the receivers of the Pacific Railroad. He can tell you all about it; he is one of the largest stockholders in the concern.

Q. Is there any sale for it now?

180 A. I don't know; the original stock was just double what that is there; then they reduced the stock. The stock sold for two hundred per cent. premium. I paid two hundred per cent. premium for the stock and some assessments on top of that to get the work started, and they found they had the capital too much, and they just recapitalized it and cut it in two. It cost me twelve thousand dollars in cash, as he will tell you, for I gave the money to Buckley.

Q. L. A. Rosenthal; where does he live?

A. At Veneta, Kansas.

Q. Is he good?

A. Yes, he is; I could have made the money the other day if I had a chance.

Q. How?

A. He had six car-loads of cattle here; it was about the time of the proving up of the claim—not far from that time.

Q. Has he got the things covered up?

A. Well, he is in business out there. He has been slow, and I have just been watching and laying for him to catch him.

181 He is a shipper of cattle here more or less. He sells goods and gets cattle for them and sends them here.

Q. Thomas Miller; where does he live?

A. He lives over here at Beecher City. That is in judgment in the hands of W. L. Gross, of Springfield, Illinois, and the money ought to be made out of it very soon. Mr. Gross writes: It was sued for in the United States Court there, and judgment was had in the United States Court at Springfield.

Q. J. B. Bratney; do you know him?

A. Yes, sir; he is perfectly good.

Q. Where is he living?

A. You will find his name on the books; I cannot recollect now.

Q. D. W. Williams; where does he live?

A. He lives at Washington, Kansas. It is secured, and there is a judgment, but under the law of Kansas he has a stay of execution for some months. I think he has two or three months yet to run. It is well secured.

Q. Do you know what lawyer it is in the hands of?

A. I think you have got it on your file there; but I can

182 tell you from my book. You will find it minuted on the ledger, too. The men also are Stellings and Fenelon, of Leavenworth. The claim was sent to them, and they sent it to their correspondent. I could tell you who the correspondent is, too, but Stellings and Fenelon are the parties.

Q. J. L. Hart—what about that note?

A. That is secured by endorsement. The books will show you in whose hands it is in now as attorney for collection. If not, I can furnish it; but I think in almost every instance you will find it minuted on the ledger in whose hands those claims are; I think that is secured by endorsement.

Q. This judgment against E. H. Gruber & Company for ten thousand six hundred dollars, how does that stand?

A. Well, Mr. Gruber is a banker, and he failed and made an assignment. He did not assign anything to amount to anything. It was all covered up by previous collaterals that he had borrowed

money on, so there was nothing left for the creditors, to
183 speak of. He went to New Orleans, and he has made a very handsome raise there, and applied for a discharge in bankruptcy, but I sent the claim to attorneys there, with instructions to resist his discharge, unless he pays the amount. He has to pay thirty cents of the amount to be discharged, because it was a voluntary thing on his part. I am resisting him. He has got a bank at Dallas, Texas, running a bank there.

Q. Is your claim in judgment?

A. My claim is in judgment in the hands of somebody. I can furnish the names, but it is the hands of attorneys in New Orleans, resisting his discharge and looking after the claim there, but he himself is in Dallas, Texas, now. He failed there in the last six months and opened a bank there.

Q. Here is sixty-two and one-half per cent. interest in the firm of E. Fenelon & Company, now in liquidation. Who is taking charge of the liquidation of that firm?

A. Well, I was, more especially. Nobody else.

Q. In St. Louis, here?

184 A. Yes, sir.

Q. Who was the members in that firm?

A. C. H. Ingraham & Company. Of that firm the members were Edward Fenelon, myself, C. H. Ingraham, J. R. Caldwell, and Michael Gallagher.

Q. And you have 62½ per cent. interest?

A. Yes, sir.

Q. Where did they do business?

A. At 513 and 515 North Second st.

Q. What did their assets consist of?

A. They consist of notes and accounts past due, some secured and some unsecured.

Q. How much do you estimate will be realized out of them? Do you mean by the amount of assets, $8,675.15, that that is the whole, and that you have 62½ per cent. in that?

A. That is the whole, I presume. I presume it is; of course, not having the items before me, I cannot tell certainly. It is not itemized here, but I presume that must be the footing.

Q. What do you estimate will be the value of those assets?

185 A. Well, we thought that the most of them were collected.

Q. Have you collected anything on them lately?

A. I have not; no sir.

Q. You are the partner winding up the concern, are you not?

A. No; not that firm.

Q. Who is winding up that firm?

A. C. H. Ingraham & Company have been winding that up.

Q. Where are they?

A. They are in the city; located in the city.

Q. Are they doing business here?

A. Yes, sir.

Q. At what point; what part of the city?

A. Right up here; pretty near opposite the Merchants' Exchange, on Chestnut street.

Q. One-half interest in the firm of Carney, Garrett & Company, now in liquidation, $6,945. Who has that in charge?

A. They have.

Q. Is there anything to be realized out of that?

A. Yes, sir.

Q. Who are the partners in that firm?

A. Mr. Alexander Garrett, Edward Fenelon, Mr. Gal-
186 lagher, Mr. Ingrahan, and myself.

Q. One-half interest in Carney, Garrett, Fenelon, & Company, now in liquidation, 18 thousand and 62 dollars. What about that?

A. That is a later firm.

Q. Who has that in charge?

A. They have got the same thing—J. H. Ingraham & Company.

Q. Do you know whether there is any value in those assets?

A. Yes, sir; there is good many; for instance, there is one that I know—I was going to attend to myself. That was summer before last. A man named Coleman, of Dixon, Illinois. You will find the debt of Campbell & Company—got a judgment for 1,400 and some odd dollars. Coleman is a man worth at least twenty to twenty-five thousand dollars in real estate, and he became disipated and made a trustee deed, and deeded his property to this trustee to be kept for five years from the time of the deed, but didn't put it on file until more than two-thirds of the time had expired, I guess,
and he bought these goods. I went up there and he con-
187 fessed judgment, and arranged it so that, at the end of the time, which is coming due now in a very few months when the deed of trust expires, it should be paid. The claim was given to J. P. Colby, and I wrote to the attorneys sometime ago and requested them not to pay the money to J. P. Colby. The man is a very excellent lawyer in Dixon, Illinois. I don't recollect his name, but his partner was attorney-general for the state. That money is just as safe as anything in the world. There are a good many others perfectly secure that are in hands for collection that will be realized from soon.

Q. The firm of Carney, Fenelon and Company, 56⅔ per cent. interest. Who has charge of that?

A. That I am winding up myself.

Q. Who are the partners in that firm?

A. Edward Fenelon and Michael Gallagher.

Q. Do either of them reside here?

A. Mr. Gallagher does; Mr. Fenelon resides at Leavenworth.

Q. Is there anything on hand now belonging to that firm in money?

A. No, sir.

Q. What does the 31,898 dollars *asset* consist of?

188 A. Well, in scattered accounts and in some of the accounts that Mr. Gallagher and Mr. Fenelon owes the concern. Mr. Fenelon is good for his portion. He must owe some five or six thousand dollars I should say. Fenelon is a contractor there now, and is making money. He has been contractor for the government and doing business in Texas and the Indian country, supplying cattle, and so on, and giving transportation for the government, and is making money.

Q. Has he got anything now out of which the claim could be made?

A. I think he is. He will pay it, too. He is a very honorable man. He is a brother of Tom Fenelon, one of the leading lawyers of Kansas.

Q. Anything else besides accounts and the claim against Fenelon?

A. No.

Q. Is any of the rest of it good besides the claim against Fenelon?

A. Oh, yes, I think so; and there is a claim against Michael Gallagher in that same amount. I presume so from the amount. I am just guessing at it now, not having the items before me.

189 Q. Who has the books of that firm of Carney, Fenelon & Company?

A. They are in Mr. Thayer's office, I think.

Q. Who has the books of these other three firms?

A. I think Mr. Thayer has them all.

Q. What do the assets of this firm of Carney, Fenelon & Company consist of?

A. Just notes and accounts—about the same character.

Q. Is there any value in these?

A. Oh, yes; there is an account there, the small account there against Mr. Fenelon, and there is an account of Alexander Garrett, of Carney & Company; he is perfectly good; either he owes it or C. H. Ingraham owes it.

Q. What kind of business is C. H. Ingraham & Compony doing?

A. They are in the brokerage business; what we call the grain brokerage business here; what they call in Chicago "option business."

Q. Have they any means?

A. They had some twenty odd thousand dollars when they left me?

Q. You don't know how they are now?

190 A. No sir, I don't; I understand they have a very good farm in this state, but I don't know that, only from hearsay; I don't know that to be so. They had over twenty thousand

in cash when they left me; I heard somebody say the other day they had bought a good farm in Schuyler County.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF MISSOURI, } ss.

I, Joseph H. Clark, clerk of the District Court of the United States in and for the Eastern District of Missouri, do hereby certify the writing hereto annexed to be a true copy of the examination of bankrupt filed on the 25th May, A. D., 1876, with Lucien Eaton, Esquire, one of the registers in bankruptcy of this court in the matter of Thomas Carney, bankrupt, in bankruptcy, as fully as the same remains on file in said matter in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said
192 District, this nineteenth day of June, in the year of our Lord eighteen hundred and eighty.

[SEAL.] (Signed) JOSEPH H. CLARK,
Clerk of said Court.
By WM. MORGAN,
Deputy.

Motion and Order for Writ of Error.

Extract from the minutes November Term, 1880.

NEW ORLEANS, *Wednesday, January 19th*, 1881.—Court met pursuant to adjournment. Present, Hon. E. C. Billings, District Judge.

PRESTON PLAYER
vs. } No. 8964.
JOS. ROSENTHAL.

On motion of Chas. S. Rice and Joseph P. Hornor, attorneys for defendants.

It is ordered that said defendant be allowed a writ of error to the Supreme Court of the United States to operate as a supersedeas, on giving bond with security in the sum of twenty-two thousand dollars conditioned according to law.

193 *Bond for Writ of Error.—Filed January 28th*, 1881.

Know all men by these presents that we, Joseph Rosenthal, as principal, and Samuel Friedlander, as surety, are held and firmly bound unto Preston Player, assignee in bankruptcy of Thomas Carney, in the full and just sum of twenty-two thousand dollars, to be paid to the said Preston Player, assignee in bankruptcy of Thomas Carney, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves,

our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals and dated this 27th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas, lately at a Circuit Court of the United States, Fifth Judicial Circuit, holding sessions in and for the District of Louisiana, in a suit depending in said circuit court, wherein Preston Player, assignee in bankruptcy of Thomas Carney, was plaintiff, and Joseph Rosenthal was defendant, judgment was rendered
194 against said Joseph Rosenthal, defendant, and the said Joseph Rosenthal having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Preston Player, assignee in bankruptcy of Thomas Carney, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Joseph Rosenthal shall prosecute his writ to effect, and answer all damages and cost, if he fail to make his plea good, then the above obligations to be void, else to remain in full force and virtue.

(Signed) J. ROSENTHAL. [L. S.]
(Do) SAMUEL FRIEDLANDER. [L. S.]

Approved:
(Signed) EDWARD C. BILLINGS, *Judge.*

UNITED STATES OF AMERICA, } *ss.*
DISTRICT OF LOUISIANA, }

Personally appeared Samuel Friedlander, who, being duly
195 sworn, doposes and says that he is the surety on the within bond; that he resides in the city of New Orleans, in the State of Louisiana, and is worth the full sum of twenty-two thousand dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) SAMUEL FRIEDLANDER.

Subscribed and sworn before me, this 27th day of January, 1881.
[SEAL.] (Signed) T. WHARTON COLLENS,
Notary Public.

Approved:
(Signed) THOS. J. SEMMES,
27 January, 1881. *For pl'ff.*

196 UNITED STATES OF AMERICA.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE:

I, Francis A. Woolfley, clerk of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, do hereby certify that the foregoing 195 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had in case of Preston Player, assignee in bankruptcy for Thomas Carney, versus Joseph Rosenthal, No. 8964 of the docket of said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 21st day of March, A. D. 1881. (Nine (9) words erased approved.)

F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States Judge for the District of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, was, at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 21st day of March, A. D. 1881.

EDWARD C. BILLINGS, *Judge.*

197 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States in and for the Fifth Circuit, and holding sessions for the District of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Preston Player, assignee of Thomas Carney, and Joseph Rosenthal, a manifest error hath happened, to the great damage of the said Joseph Rosenthal as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do com and you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 19th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Endorsed:) United States Circuit Court. No. 8964. Joseph Rosenthal, plaintiff in error, versus Preston Player, assignee of Thomas Carney, defendant in error. Writ of error. Filed Jan'y 19th, 1881. T. V. Coupland, d'y clerk.

198 THE UNITED STATES OF AMERICA.

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Preston Player, assignee of Thomas Carney, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, wherein Joseph Rosenthal is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Joseph Rosenthal as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

EDWARD C. BILLINGS.

199 (Endorsed:) United States Circuit Court. No. 8964. Joseph Rosenthal, plaintiff in error, vs. Preston Player, assignee of Thomas Carney, defendant in error. Citation.

I, Thomas Boswell, a lawful deputy of Jack Wharton, U. S. marshal for the eastern district of Louisiana, do hereby swear that I served a true copy of the within citation in error was served in the manner and at the time set forth in the return hereby.

JACK WHARTON,
U. S. Marshal.
By THOMAS BOSWELL,
Deputy U. S. Marshal.

Marshal's Return.

Received by the U. S. marshal March 17th, 1881, and on the same day, month and year I served a true copy of the within cita-

tion in error on Preston Player, assignee of Thomas Carney, defendant in error, by handing the same to Thomas Jefferson Semms, Esq., attorney of record for said Preston Player, in person, said Preston Player residing out of the district of Louisiana.

THOMAS BOSWELL,
Deputy U. S. Marshal.

Subscribed and sworn before me this March 22, 1881.

T. V. COUPLAND,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

(Endorsed on cover:) Louisiana, C. C. U. S. No. 276. Joseph Rosenthal, plaintiff in error, vs. Preston Player, assignee in bankruptcy of Thomas Carney. Filed 15th August, 1881.

111-185

SUPREME COURT OF THE U.S.
FILED
FEB 20 1894
JAMES H. McKENNEY, CLERK

IN THE

Supreme Court of the United States

No. 276.

JOSEPH ROSENTHALL, Plaintiff in Error,

vs.

PRESTON PLAYER, Assignee in Bankruptcy of THOMAS CARNEY, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

BRIEF FOR PLAINTIFF IN ERROR,

By SHELLABARGER & WILSON.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1873.

JOSEPH ROSENTHAL, Plaintiff in Error,
vs.
PRESTON PLAYER, Assignee in Bankruptcy of THOMAS CARNEY. } No. 276.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

This case is brought to this court by a writ of error to the Circuit Court for the district of Louisiana. The action below was one by the defendant in error, Preston Player, as assignee in bankruptcy of Thomas Carney.

The petition was filed December 30, 1879, in the said Circuit Court, by the assignee in bankruptcy, under the authority of section 5047 of the Revised Statutes, authorizing the assignee to recover all the assets, debts, and effects of the bankrupt in an action, and alleges, in substance—

(1) That on the 20th of October, 1875, in the District Court for Mississippi, Wooldridge and other creditors of Thomas Carney caused proceedings to be instituted to have him adjudged a bankrupt.

(2) That on the 1st of August, 1875, Carney, a merchant, suspended and did not resume business.

(3) That on the 18th of March, 1876, at the eastern district of Missouri, Carney became a bankrupt before the

institution of said proceedings, and was adjudged a bankrupt, and plaintiff was chosen assignee.

(4) That on the 1st of May, 1876, and the 30th of May, 1876, the register conveyed to the plaintiff all of Carney's estate, as appears by the record, made Exhibit P.

(5) That three months next before the institution of the said proceedings in bankruptcy, to wit, beginning the 20th of July, 1875, and ending the 23rd of August, 1875, at St. Louis county, Carney, then insolvent and in contemplation of insolvency, and with the intent to defeat the bankrupt law, made payments and transfers of money amounting in the aggregate to $30,000, the property of Carney.

(6) That at the time when the said aggregate of $30,000 was finally paid by said bankrupt, the defendant, Rosenthal, had reason to believe said Carney to be insolvent and to be acting in contemplation of insolvency; and that he, Rosenthal, knew that the payments and transfers of said aggregate of $30,000 were made with a view on the part of the bankrupt to prevent the said aggregate of money from being distributed under the bankrupt law.

(7) That on the 22d of June, 1875, at the eastern district of Missouri, Carney was insolvent, and in contemplation of insolvency, and that Rosenthal had reasonable cause to believe him (Carney) insolvent, with intent to defeat the bankrupt laws and prevent the property described below from being distributed under the bankrupt law, and to hinder the operation of said law and evade its provisions, as Rosenthal well knew, Carney sold and conveyed unto Rosenthal, *on the 23d of June*, 1875, 500 *cases and parts of cases of boots and shoes*, containing 30,000 pairs of boots and shoes, property of Carney, of the value of $45,000.

(8) That afterwards, on the 20th of July, 1875, and within three months before the institution of the said proceedings in bankruptcy, Carney, for the purpose of further accomplishing said fraudulent transfer and conveyance, agreed that said Carney should have an equal interest in

said goods with defendant Rosenthal, and Rosenthal then recognized and admitted such interest.

(9) That afterwards, on the 22d of July, 1875, Carney, then insolvent and in contemplation of insolvency, as Rosenthal had reason and cause to believe, with intent to defeat the object of the bankrupt laws and to prevent the property described below from being distributed under such laws, as Rosenthal well knew, conveyed to Rosenthal 100 barrels of whisky of the value of $7,000; 100 kegs of soda, value $800; 75 boxes of lye, value $400; 300 cases of peaches and oysters, value $1,500; all amounting to $9,400, and that Carney agreed to retain an interest in said goods equal to that of Rosenthal, and that Rosenthal recognized that interest accordingly.

(10) That afterwards, on the 20th day of July, 1875, and the 1st of March, 1876, the said defendant sold said boots and shoes, whisky, soda, lye, oysters, and peaches, and converted them into cash, and the proceeds were received by Rosenthal and converted to his own use, and by him in no manner accounted for to the plaintiff, assignee.

(11) The petition then avers the following, in these words:

"*The plaintiff states that both the said Carney and the defendant kept concealed from him, the said plaintiff, the fact of the said payment and transfer of the said aggregate sum of* $30,000, *hereinbefore mentioned, and of all the component parts thereof; and also kept concealed from him the fact of the sale, transfer, and conveyance of the said goods and merchandize hereinbefore set forth, and that he, the said plaintiff, did not obtain knowledge and information of the said matters, or of either of them, until the 29th day of November,* 1879, *and then for the first time the said matters were disclosed to him and brought to his knowledge.*"

(12) The petition concludes by averring that, in view of the proceedings and in accordance with the statute, an action has accrued to plaintiff to demand said sum of $30,000,

unlawfully paid as aforesaid, and the aggregate value of the said merchandize so unlawfully appropriated by the defendant, to wit, the sum of $54,400, which respective sums amount in the aggregate to $84,400, and prays citation and judgment.

The record of the proceedings resulting in the judgment of bankruptcy, etc., is found at Record, pages 4 to 10. This record shows that the petition of the creditors was filed in the District Court of the eastern district of Missouri, December 30, 1879. (R., p. 4.)

The court adjudged him a bankrupt on the 18th of March, 1876. (R., pp. 7 and 8.) The selection of the plaintiff, Preston Player, as assignee, was approved by the court May 1, 1876. (R., p. 8.) L. Eaton, register in bankruptcy, assigned the bankrupt's property to the assignee, Player, on the 3d of May, 1876. (R., pp. 8 and 9.) Defendant Rosenthal was cited to appear and answer in the case below, December 30, 1879. (R., p. 10.)

On the 20th of January, 1880, (R., pp. 10 and 11,) defendant filed "EXCEPTIONS" to the plaintiff's action, *reserving and not waiving his right to plead or answer.* These exceptions are:

(1) "*That as appears from the plaintiff's petition said suit was not brought within the time when the pretended cause of action accrued, if the same accrued at all, for the said assignee, plaintiff, and the said suit is not maintainable.*

(2) "That said sale, transfer, and conveyance of five hundred cases and parts of cases of boots and shoes, alleged and pretended in the said petition to have been made by the said bankrupt to this exceptor on the 22d day of June, 1875, was not, if made at all, made within three months before the filing of the petition against the said bankrupt, as appears on the face of the plaintiff's petition, and the demand in the said petition in respect to said alleged and pretended sale, transfer, and conveyance is not maintainable.

"Wherefore this exceptor prays that this exception be

maintained, and that plaintiff's suit be dismissed with costs, and that he have all general relief."

February 25th, 1880, (R., pp. 11, 12,) the court ordered the first ground of exception to be *dismissed absolutely;* and as to the second ground of exception the court ordered it to be dismissed, but not so as to prejudice the right of the plaintiff to prove the transaction alleged in the petition to have taken place July 20, 1875, and within three months before the proceedings in bankruptcy commenced, the court maintaining the ground of said second exception only so far as related to the transfer of the 500 cases of boots and shoes alleged to have been made June 22, 1875; the court also reserving to plaintiff the right to prove that, as he alleges, subsequent to the 22d of June, 1875, the bankrupt by agreement with Rosenthal was revested with an interest in said goods, and therefore within three months the goods were deposited as alleged.

May 3, 1880, (R., p. 12,) defendant Rosenthal, *reserving the benefit of his exception before taken*, filed an answer denying all and singular the allegations of the petition.

December 7, 1880, (R., pp. 12, 13,) defendant Rosenthal filed supplemental answer in these words:

"Now comes the defendant and pleads the prescription of two years as provided for in the bankrupt act, section of the Revised Statutes of the United States, in bar of plaintiff's action. And for supplemental answer to petition of plaintiff, defendant special denies that the matters and things alleged in the plaintiff's petition were first disclosed to him on November 29, 1879, as alleged, but avers that said plaintiff had full knowledge of all the transactions that ever took place between the defendant and Carney, bankrupt, at the time the said plaintiff was elected assignee.

"Wherefore, without waiver of any part of the answer heretofore filed, but specially reserving all rights thereto, defendant prays that this supplemental petition be filed and that the plaintiff's suit be dismissed with costs, and for all general relief."

December 15, 1880, the jury returned a verdict for the plaintiff in the sum of $17,500, with interest from judicial demand, (R., p. 13.)

On the 15th of December, 1880, (R., p. 14,) the court rendered a judgment against the defendant of the sum of $17,500, with 5 per cent. interest per annum, from the 30th of December, 1879.

December 17, 1880, the court, on motion, allowed ten days to the defendants to present their exceptions, (R., p. 14.)

The bill of exceptions in the case we will notice seriatim in the brief.

Assignment of Errors.

The plaintiff assigns the following errors upon the said record:

First. That the court erred in holding that the petition of the plaintiff was maintainable under and upon the facts therein set forth, and in not sustaining the defendant's exceptions filed the 20th of January, 1880, (R., pp. 11 and 12.)

Second. The court erred in holding that the prescription of two years pleaded by the defendant, as set forth in said exception filed January 20, 1880, was not a bar to said action, and did not defeat the same, as such holding is set forth in bill of exceptions No. 1, (R., pp. 14 and 15,) and in holding that the averments in the petition relating to concealment of cause of action were sufficient to avoid the bar of the statute of limitation.

Third. The court erred in holding that the second paragraph of the plaintiff's supplemental petition, as set forth on page 11 of the record, should be stricken out against the defendant's objection, as set forth in bill of exceptions No. 1, page 15.

Fourth. The court erred in holding that the plaintiff was entitled to offer evidence under the averments of the said

petition in regard to the fraudulent concealment of the cause of action, and its not being discovered by the plaintiff until within two years prior to the commencement of said action, the averments of the petition and pleadings on the part of the plaintiff not being such as to authorize such proof.

Fifth. The court erred in overruling the objections made by the defendant to the depositions, as set forth in bill of exceptions No. 2, and in not sustaining the defendant's objections to the said evidence and in admitting the same.

Sixth. The court erred in admitting in evidence, on behalf of the plaintiff, the letter-press copies of letters, and in overruling the objections thereto, as set forth in bill of exceptions No. 3, and in holding that the mailing of said letters, as stated in said exceptions, was prima-facie proof that defendant received them.

Seventh. The court erred in refusing to charge the jury as asked by the defendant, as set forth in bill of exceptions No. 4, (R., pp. 21 and 22.)

Eighth. The court erred in refusing to charge the jury as set forth in bill of exceptions No. 5, pp. 22 and 23, and in charging the jury as the court charged, as disclosed in the said bill of exceptions No. 5.

Ninth. The court erred in refusing to give the charge marked 1st, set forth in bill of exceptions No. 6, as asked by the defendant, (R., pp. 22 and 23,) except with the qualification as given on page 23.

Tenth. The court erred in refusing to give the charge marked 2d (R., p. 24,) except with the qualification as there stated.

Eleventh. The court erred in the charges given to the jury as set forth in said bill of exceptions No. 6, in the narrative form, where the court in substance and effect instructs the jury that they were authorized, notwithstanding the statute required such suit to be brought within two years, to find for the plaintiff, provided the action was

brought within two years from the time when the plaintiff or his assignee ought by due diligence to have discovered such cause of action; such authorization of the jury to find whether the cause of action had been fraudulently concealed from the plaintiff not being competent to be proved or set up under the averments of the petition and all the other pleadings of the case.

Twelfth. The court erred in refusing to give the instruction to the jury that the fact that the assignee did not discover his right of action to certain property of the bankrupt until after the expiration of two years from the time an action accrued to him does not remove the bar prescribed by the act; and the court erred in qualifying the said request for a charge in the manner such qualification is set forth at the end of said bill of exceptions No. 6, (R., p. 26.)

Thirteenth. The court erred in refusing to allow the defendant, in the trial of the rule for a new trial, to introduce the evidence, offered by the defendant, of G. B. Burton and Thomas Wiltz as witnesses to prove that the jury misbehaved and reached its verdict as set forth in bill of exceptions No. 7, (R., pp. 26 and 27.)

Fourteenth. The court erred in holding that the said petition contained a sufficient averment and statement of facts in regard to the fraudulent concealment by the defendant and others of the cause of action to authorize evidence to be given by the plaintiff in regard to such fraudulent concealment, and in requiring the defendant to go to trial as to said alleged frauds on said averment.

Fifteenth. The court erred in holding that the said petition did not contain upon its face that which showed that the plaintiff's alleged cause of action was barred by the two years' limitation contained in section 5057 of the Revised Statutes, and in holding that the said petition and cause of action ought not to be dismissed, as was demanded by the defendant's exceptions, filed Jan'y 2, 1880, (R., pp. 10 and 11.)

The court erred in rendering a judgment for the plaintiff in the said action.

There are other manifest errors in the record.

Brief.

It may be proper here to insert, as bearing upon the nature of the exceptions filed January 20, 1880, (R., p. 10,) and as showing that these exceptions are in the nature of a demurrer, and also as showing that the exception is a peremptory one of substance "arising from the law" and not of form, and that "exceptions" are a proper mode of pleading a limitation, the following articles of the Louisiana Code of Practice. Article 343 reads as follows:

"Peremptory exceptions are those which tend to the dismissal of the action. Some relate to *forms*, others *arise from the law*."

Article 345 reads as follows:

"Peremptory exceptions, founded on law, are those which, without going to the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed, or because the cause of action has been destroyed or extinguished."

This exception, taken on the 20th of January, is, therefore, provided for in section 345, and is in the nature of a demurrer to the petition; and was properly taken under the practice in Louisiana, which practice, by section 914 of the Revised Statutes of the United States, is made the rule for the government of such trials as this.

In the case of Fletcher *v.* Dunbar, 21 Louisiana Annual Reports, 150, the answer was prefaced by a peremptory exception alleging that the petition disclosed no cause of action, just as the exception does in the case at bar, and the answer prayed that the suit might be dismissed, as the exception did in the present case, and thereupon the an-

swer proceeded with a *protestando* to plead to the merits. The case was tried on its merits and the judge *a quo* gave judgment sustaining the exception and dismissed the suit as in case of nonsuit. From this judgment the plaintiff appealed. The court, in deciding the case, says, page 151:

"It is urged by the plaintiff that *by going to trial on the merits the defendant waived the peremptory exception*, and the judge *a quo* had no right to consider and maintain it after the trial. This view may be correct where the exception is to a matter of form, but it is incorrect when applied to such an exception as the one before us."

Martin *v.* McMasters, 4 An., 422.

In Grove *v.* Harvey (12 Rob., 226) the same thing is decided that the benefit of an overruled exception is not lost by answering over.

And that a prescription is under the Louisiana practice presented by such peremptory exceptions as were in this case filed on the 20th of January, 1880, (R., p. 10,) under articles 345 and 346 of the code, and may be presented at any time before judgment is thoroughly settled. (See Lejune *v.* Herbert, 6 Rob., 419.)

THE TWO-YEAR LIMITATION.

If, therefore, there was error in the overruling of this exception setting forth—

"That, as appears from the plaintiff's petition, suit has not been brought within two years from the time when the pretended cause of action accrued, if the same accrued at all, for said assignee plaintiff, and the said suit is not maintainable."

—then this error is not waived, and can be corrected by this court.

The exception in paragraph No. 1 (R., p. 11) setting up the two years' prescription is, therefore, in the nature of a demurrer to the plaintiff's petition. The question this

demurrer or exception presents is this: Did the court err in compelling defendant below to go to trial on the averments of the petition as they stood? This petition was filed in the Circuit Court on the 30th of December, 1879, (see R., p. 1.) The cause of action which it sets forth is the fraudulent and wrongful payment and transfer by Thomas Carney, in contemplation of insolvency, to the defendant of certain sums of money amounting to $30,000, which payments of $30,000 it avers were made between the 20th of July, 1875, and the 23d of August, 1875, and the transfers of property by Carney, in contemplation of insolvency, to the defendant were made June 22, 1875. These fraudulent payments and transfers in June and July, 1875, are the gist of the plaintiff's action. The petition discloses on its face the time when the cause of action accrued, and that time was more than four years prior to the commencement of the suit. By the face of the petition, therefore, the action was barred by section 5057 of the Revised Statues, which provides:

"No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferrable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against the assignee. And this provision shall not in any case revive a right of action barred at the time when the assignee is appointed."

Did the court, therefore, err in holding that the defendant below should be compelled to go to trial on this petition as it stood, without amendment? And this question presents the further point that since the face of the petition showed that the action was barred, therefore this objection of the bar might be taken by demurrer; or, in Louisiana, by a peremptory exception.

In this case the prescription was presented in the only way in which it could be presented in Louisiana.

Besides this, in all the States in the Federal courts the objection that the pleading shows the cause of action barred may be taken by demurrer. (National Bank *vs.* Carpenter, 101 U. S., 567, and cases cited.)

It became necessary for the petition to set forth that which would be a sufficient removal of the bar which the face of the petition disclosed. This the petition attempted to do; and the question is, did the petition do this in such way as that it was not error for the court to compel the party to go to trial in regard to that fraud which is set up as removing the bar of the two years? In other words, is the alleged fraud relied on as removing said two years' bar so averred, that the defendant below, the appellant here, should by the court have been compelled to go to trial without more specific averments as to what constituted the fraud? The only averments of the petition in regard to what constituted the fraud and delivered the case from the two years' bar is in these words:

"The plaintiff states that both the said Carney and the said defendant kept concealed from him, the said plaintiff, the fact of the said payment and transfer of the said aggregate sum of $30,000, hereinbefore mentioned, and of all the component parts thereof, and also kept concealed from him the fact of the sale, transfer, and conveyance of the said goods and merchandize hereinbefore set forth; and that he, the said plaintiff, did not obtain knowledge and information of the said matters, or either of them, until the 29th day of November, 1879, then for the first time the said matters were disclosed to him and brought to his knowledg[illegible]"

That this averment of fraud is not sufficient, and that said demurrer ought to have been sustained, is, we submit, expressly held in the case by this court of Wood *vs.* Carpenter, (11 Otto, 135.) This case of Wood *vs.* Carpenter is one where the statutes of Indiana removed a certain six years' bar in a provision expressed in these words: "If any person liable to an action shall conceal the fact from

the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action;" and the question presented to this court was whether the averment of the reply in that case were a sufficient allegation of the fraud to bring it within said language of the Indiana statute? That reply stated that "the defendant concealed the facts that the judgments confessed in favor of Chapman and others were fraudulent; that Alvin C. Carpenter held the said property, real and personal, in trust for the defendant; that the defendant had committed perjury before the master in Massachusetts; that Keller had bought the judgments with the defendant's money, and for the defendant's use and benefit; that the defendant was, in fact, the owner of the property, and that it was held by his brother and others in secret trust for him, and that his representations as to his insolvency were false and fraudulent."

It was averred further that the concealment was effected by the defendant by means of fraud, perjury, and the other wicked devices set forth and described in the plaintiff's complaint herein; and that the plaintiff had no knowledge of the facts so concealed by the defendant until the year 1872, and a few weeks only before the commencement of this suit.

The defendant demurred to the last two paragraphs of the reply. The demurer was sustained, and the only question presented to this court for consideration was whether the demurrer was properly sustained.

It will thus be seen that the exact question presented to the court in the case of Wood *v.* Carpenter was presented to the Circuit Court in the present case, and was presented in the same way, to wit, by an exception to the petition in the nature of a demurrer.

This court, in sustaining the ruling of the court below, when it sustained the demurrer to the reply, states the law as follows, page 139:

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. * * *

"The provision in the statute of which the plaintiff seeks to avail himself was originally established in equity, and has since been made applicable in trials at law.

"There is no trace of it in the English statute of limitations of the 21st of James I, which was adopted in most of the American colonies before the revolution, and has since been the foundation of nearly all of the like legislation in this country.

"Having been imported from equity, the adjudications of equitable and legal tribunals upon the subject are alike entitled to consideration.

"Upon looking carefully into the reply, we find it sets forth that the concealment touching the cause of action was effected by the defendant by means of the several frauds and falsehoods averred more at length in the complaint. The former is only a brief epitome of the latter. There is the same generality of statement and denunciation, and the same absence of specific details in both. No point in the complaint is omitted in the reply, but no new light is thrown in which tends to show the relation of cause and effect, or, in other words, that the protracted concealment which is admitted, necessarily followed from the facts and circumstances which are said to have produced it.

"It will be observed also that there is no averment that during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. * * * With the strongest motives to action the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort. * * * *

"The discovery of the cause of action, if such it may be termed, is thus set forth: 'And the plaintiff further avers that he had no knowledge of the facts so concealed by the defendant until the year A. D. 1872, and a few weeks only before the bringing of this suit.' There is nothing further upon the subject.

"In this class of cases the plaintiff is held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.' Stearns *v.* Page, 7 How., 819, 829. This is necessary to enable the defendant to meet the fraud and the time of its discovery. Moore *v.* Greene et al., 19 id., 69, 72. The same rules were again laid down in Boubien *v.* Boubien, 23 id., 190, and in Badger *v.* Badger, 2 Wall., 95."

"A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery it should be stated when it was made, what it was, how it was made, and why it was not made sooner. Carr *v.* Hilton, 1 Curtis, Circuit Court Rep., 220.

"The fraud intended by the section which shall arrest the running of the statute must be one that is secret and concealed, and not one that is patent or known. Martin, assignee, etc., *v.* Smith, 1 Dillon, 85, and the authorities cited."

The court then proceeds to cite the case of Kennedy *v.* Greene, 3 Myl. & K., 722; also the case of Buckner and Stanton *v.* Calcote, 28 Miss., 432, 434; also Nudd *v.* Hamblin, 8 Allen (Mass.), 130, these last cases being cited to the point that the party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power he will be held to have known it.

The court sums up the result of all the cases, thus:

"Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.

"There must be reasonable diligence, and the means of knowledge are the same thing in effect as knowledge itself.

"The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.

"The reply is clearly bad. It contains some vigorous declamation, but is wanting in the averments of facts, which are indispensable to give it sufficiency as a pleading for the purpose intended. The complaint to which it refers does not help it. Further remarks are unnecessary. The demurrer was properly sustained by the Circuit Court."

We have thus fully cited this language for the purpose of showing how fully and exactly it covers the present case and rules it. Every objection made by this court to that reply is here, with double force, applicable. The averments of fraud under which the defendant was compelled to go to trial, as found in the petition, (see R., pp. 3 and 4,) are of the most general and vague description, simply saying that the defendant kept concealed the fact of the transfer of the $30,000, and the component parts thereof, and kept concealed the fact of the sale set forth, and that plaintiff did not obtain information of these until the 29th of November, 1879.

It avers no fact as to how the concealment was accomplished; no fact as to any means being resorted to to discover the fraudulent transfers; no averment as to what tricks or contrivances were resorted to in order to accomplish the concealment; no averment that any diligence was resorted to to discover the fraud; no averment of the circumstances by which the discovery of the fraud was obtained; no fact whatever going to show wherein the fraud consisted, nor how it accomplished its purpose, nor any other averment requisite to enable the defendant to meet the fraud, or to know what it was in the way of fact that he would be called upon to encounter and overthrow.

This case of Wood *v.* Carpenter was not, we believe, decided in February, 1880, at the time when Judge Billings overruled these exceptions. It certainly was not reported or known to him. Had it been he could not have overruled the exception.

This case of Wood *v.* Carpenter is reaffirmed in National

Bank *v.* Carpenter, (101 U. S.,) and in National Bank *v.* Carpenter the facts regarding the indefiniteness of the averments of the fraud relied on to remove the bar of limitation are nearly identical with Wood *v.* Carpenter.

In the light of these cases, which seem to us to rule the the present one, the court ought to have dismissed the suit below.

We think it would be quite safe to leave the discussion at this point.

It may, however, be proper to notice some of the other matters disclosed by the bill of exceptions.

BILL OF EXCEPTIONS No. 2.

It will be seen (R., pp. 12, 16,) that the court struck out of the plaintiff's petition the averments regarding the sale of 500 cases of boots and shoes made the 22d of June, 1875.

It will be further seen that the deposition excepted to in the bill of exceptions No. 2, and which the court admitted against the objection of the defendant, related only to the sale of the 500 cases of boots and shoes which the court had ordered to be stricken out of the petition. The depositions did not in any degree relate to the defendant's being reinvested with an interest in said boots and shoes. They, according to the bill of exceptions, threw no light upon that. They were wholly immaterial depositions. Being *confined* to a sale which had been wholly excluded from the case, they afforded no light regarding the bankrupt's "alleged reinvestment with an interest" therein.

By the act of 22d of June, 1874, (18 Stats., 180,) the six months named in section 5129 of the Revised Statutes is changed to three months, and as thus amended the section is one which suffers the validity and good faith of no "payment, sale, assignment, transfer, conveyance or other disposition of any part of" the bankrupt's property to be questioned, or in any way inquired into, unless made

within three months "before the filing of the petition by or against him. *If* made within the three months it is subject (says the court, 15 Wall., 421, 422) to examination," and even then it can be set aside *only* when two things concur, namely, the fraudulent design of the bankrupt to evade the bankrupt law, and the knowledge of it on the part of the vendee, or reasonable cause to believe that it existed. (15 Wall., 422; 18 Wall., 340, 375; 91 U. S., 121; 21 Wall., 369, 480; 22 Wall., 178.)

Since, therefore, sales made by the bankrupt more than three months before the petitions against him, are thus absolutely removed from all investigation and suspicion, and are as free from attack as if made fifty years before; and since, in this case, the court had so held and *excluded from the case* all inquiry regarding the sale of the five hundred cases of boots and shoes made 22d June, 1875, (R. 16,) therefore depositions, which the bill of exceptions showed "*related only*" (R. 16,) to that sale of the 22d June, and hence did not *touch* the matter of the alleged "reinvestment of an interest in the bankrupt," were, clearly, wholly incompetent and irrelevant. The reinvestment (if material) was a thing by itself standing on its own merits, and the fact that the defendant had four months or fifty years before bought these of the bankrupt, had no more to do with the reinvestment's character or validity than it would if the reinvestment had been by any other vendor.

Defendant having a perfect title, could invest that title unaffected by the fact that sale of 22d June, 1875, *was from the bankrupt*.

Hence, manifestly proofs through the erroneous introduction of these depositions, which were *confined* to a sale perfectly innocent and valid, were calculated to confuse and mislead the jury, and their introduction was a fatal error.

Lucas *vs.* Brooks, 18 Wall., 436.
Smith *vs.* Shoemaker, 17 Wall., 630.
Tower Co. *vs.* Phillips, 23 Wall., 471.

And when an improper charge is given to the jury, or improper evidence is admitted, and these (to here adopt they words of the court) "*may* have misled the jury to the injury of the party against whom the verdict was given, the error is fatal."

Beaver *vs.* Taylor, 1 Wall., 637, 644.

Indeed this rule is, by this court, laid down in much stronger terms than those stated in the case of Beaver *vs.* Taylor, in the case of Smith *vs.* Shoemaker, 17 Wall., 630, where this court dealt with the very question we have raised by the exception we now consider, to wit: what is the effect of admitting to the jury improper evidence which *may* have influenced the verdict? and the court there say that in order to escape the fatal effect of such improper admission of evidence on the ground that it worked no injury, "*It must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the right of the party.*"

The excuse given (R. 17) for the admission of proofs about the sale of 22d of June, 1875, which the court had excluded from the case, is that it was part of the "surrounding circumstances." It was, as we have seen, no valid excuse, because the law made such a sale innocent, lawful, and unimpeachable, and it was no part of the *res gestæ* or "surrounding circumstances," and could throw no light on an alleged "reinvestment," which must stand or fall on its own merits as a distinct title or a distinct fraud. The lawful and innocent sale of the 22d of the preceding June *could* not give bad character to the "reinvestment."

Bill of Exceptions No. 3.

The point in bill of exceptions No. 3 (R. 17–21) is that certain letter-press copies of letters by the bankrupt, Thos. Carney, to the defendant, Rosenthal, the originals of which Carney, as a witness for plaintiff, swore he mailed, at St. Louis, to the defendant at New Orleans, were over

the defendant's objects admitted to the jury. This exception shows that in a return to a "*duces tecum*" defendant swore that he never received these letters, and there was no other evidence that he received them save the testimony of Carney that he mailed them duly addressed to defendant, post paid. (R. 17–21.)

On these facts the court let them go to the jury, allowing it to decide whether they were received.

This presents the question: Was there such *kind* or *degree* of evidence of their receipt by the defendant, as that, as against defendant's oath that he did not receive them, the court could submit to the jury the question of such receipt? We submit there was not.

On general principles it would be most a dangerous doctrine to hold that a party's adversary shall be allowed to sit down all alone, write to his adversary a letter, the contents of which, if received, will impart to him information the having of which would damn him—then the writer take a letter-press copy, and then burn the original, then go into court and swear he mailed it; and then on this evidence *alone* suffer the jury to find, as against the oath of the party addressed, that the letter was received. If this be good law, there is no man whose character is not at the mercy of any enemy who may so attempt to destroy him.

The whole transaction is *res inter alios acta*.

In the case above cited of Smith *v.* Shoemaker, (17 Wall., 630,) the court held that letters could not be introduced against the party addressed, when their contents would be evidence against him if the letter was received, unless there is "some evidence that such letters were received or acted on" by the party addressed; and the court reversed the judgment because such letter was given to the jury without proof that it was received.

And this brings us to the question, was there, in this case, in view of the law, "*any* evidence" (*prima facie* or otherwise) sufficient to allow the letters to go to the jury for the

purpose of being read and considered, and for the purpose of allowing it to find that defendant did receive them?

It is true that "due diligence" as to giving notice of dishonor of negotiable paper is shown by showing that notice was duly sent by the first mail of the day of protest, if the letter is properly directed. (10 Pet., 581; 2 Wheat., 279; 9 Pet., 45) But even in such cases, relating to protests, (and which stand, as we shall see, on special reasons requiring due diligence, and not proof actual receipt of the notice,) it is not enough in mailing a letter to a large town like New Orleans, to address it to the city at large. Says 3 Phil. on Ev., side p. 216: "It is not sufficient that the letter be addressed to a person at a large town, as at Bristol, without specifying in what part of the town he resides, unless where the person to whom the letter is directed has dated the instrument in an equally general manner"—citing 1 Ry. and Mo., 148; 1 Ry. and Mo., 250.

Observe again that in these notices of dishonor the question is *not* the same which it is in the point presented by this third exception, to wit, was the letter *in fact received;* but the question in protest cases is, was it *mailed?*

Says this court in Dickens *v.* Beal, 10 Pet., 580:

"In cases of this description (protests) the true question is, has due diligence been used by the holder of the bill, *not* whether he has given or the defendant has received notice; both are immaterial if reasonable diligence has been used?"

Thus it is plain that the fact that mailing a letter properly addressed is "due diligence" in cases of protest, does not establish that proof of such mailing is sufficient proof of *actual receipt* of the letter, and hence the cases holding that mailing a notice properly addressed in cases of protest is sufficient, show nothing on the point whether proof of mailing is *prima facie* proof of *actual* receipt of the letter.

In 2 Greenleaf, sec. 40, the rule is stated in its strongest view supporting the doctrine of the presumption in favor of actual notice, in these words:

"If a letter is sent by the post, it is presumed from the known course in that department of the public service that it reached its destination at the regular time and was received by the person to whom it was addressed, if living at the place and usually receiving his letters there."

Now, this bill of exceptions shows that the following proofs were wholly lacking in this case, and which, in this authority from Greenleaf and all others of like kind, are indispensable in order to raise the presumption of actual receipt of the letter:

(1) That defendant resided at New Orleans.

(2) That he usually received his letters there.

(3) That the letter was addressed to the defendant's place in New Orleans.

(4) Saying it was "properly" addressed means nothing, as it is an averment of a legal conclusion and not of a fact.

We submit, therefore, that if this court should follow those cases which hold to the extremest view of the presumption of actual notice arising in other cases than protest cases out of posting a letter, yet the court erred in treating the proofs here as enough to allow the letters to go to the jury.

We admit that the cases, outside of those relating to notice of dishonor of commercial paper, are not uniform as to the point that mailing a letter shall be treated as *prima-facie* proof of its actual receipt.

In the case of Freeman *vs.* Morny, 45 Me., 50, the question was whether proof that a letter addressed to one of the parties was deposited in the post office, and the postage paid, raised any legal presumption that it came into the possession of the person to whom it was addressed, so as

to make secondary evidence of its contents admissible, and the court held that it did not.

On page 51 the court says:

"At common law under like circumstances such presumption is unknown. Formerly, and until regulated by statute and the custom of merchants, notices deposited in the post office to charge parties to negotiable paper were insufficient. (Ransom *vs.* Mack, 2 Hill, 587.) And in this State, until the statute of 1835, proof that letters were written and directed to overseers of the poor, through the same medium, unless accompanied by evidence of their acceptance, was not admissible to establish the receipt of notice to charge the defendant town, and not even at the present time, unless there be also proof of their arrival at the place of their delivery. The ruling complained of was then in derogation of common law, and is not sustained by the relaxation of that rule in relation to commercial paper or the pauper laws of the State."

We cite this case for the purpose of establishing two points: first, that the law in regard to protests stands on its own ground, as explained in the case cited from 10 Peters, and hence the cases applicable to such protest throw no light on our present question, to wit, what is at common law *prima facie* proof of the receipt of a letter? and, second, for the purpose of showing what the common law rule was.

In Kinney *v.* Altvatter, 77 Pa. St. R., 34, it is held that mailing a notice of dissolution of partnership is not proof of such notice. On page 38 the court uses this language when speaking of notice of the dissolution of a partnership: "He was entitled to actual notice. (Story on Part., sec. 161.) Letters properly directed and duly mailed are sufficient notice of the dishonor of bills or non-payment of negotiable notes. *This rule is restricted to commercial paper. It establishes no such legal conclusions in other business relations.* (Tanner *v.* Hughes, 3 P. F. Smith, 289.) Hence in First National Bank *v.* McMonigle, 19 P. F. Smith, 156, it

was held that there is no presumption of law that a letter directed and mailed to one at the place where he usually received his letters was received by him." And the law as we here claim is laid down in "Wade on the Law of Notice," sec. 501.

In the case of Ransom *v.* Mack, 2 Hill, 587–590, the court says:

"The rule formerly was that notice of the dishonor of a bill or note must be served personally on the drawer or endorser, or left at his dwelling-house or place of business."

We submit, without further citation of authorities, that in the cases where *actual* and guilty knowledge is sought to be attributed to a party in the courts, it would be a most dangerous doctrine to hold, as the court here did, that the mere fact that a man's adversary swears that he mailed to his "proper address" the letters giving the guilty knowledge, shall, as against the oath of the party addressed that he did not receive the letters, be enough, *prima facie*, to fix the fact of actual and guilty knowledge upon him, and this without any proof as to where the party addressed resided, or where he usually got his mail, or that the address was to his place in a large city.

But suppose we are wrong in the foregoing position, and that in a case involving no special moral turpitude, and no forfeitures or crime, it is the law that proving that notice was duly mailed does *prima facie* prove the fact of the actual receipt of the notice, yet the law will not allow such presumptions to arise when the effect of the actual receipt of the notice is to fix upon the party receiving it crime or forfeitures or other penal consequences.

In other words, in all such cases another presumption of the law, to wit, that of innocence, comes in and prevents the ordinary presumptions which apply in civil cases from arising.

In this case the letter-press copies were meant to fix on

Rosenthal knowledge which made dealing with the writer highly penal and to work severest forfeitures, (Rev. Stats., sect. 5731.)

In People *vs.* Feilen, decided by Supreme Court of California in 1881, (58 Cal. R., 218,) the doctrine is strongly stated, and the presumption of continuance of life of a first wife was held, in a bigamy prosecution, to be overthrown and neutralized by the presumption of innocence. (See Bishop on Statutes, § 611.) And in Montgomery *vs.* Bevans, 1 Sawyer, 653, is found an excellent discussion of this subject by Justice Field, where he lays down the doctrine (pp. 666–7) that the presumption of the continuance of life is overthrown by the presumption of the law in favor of innocence.

Exceptions Four, Five, and Six.

Bills of exceptions Nos. 4, 5, and 6 (R., 21) are designed to present the same question, which is in substance this: that the court ought to have charged the jury that the knowledge, in 1876, on the part of the assignee, that the bankrupt had refused to answer proper questions put under the law "relating to his property and affairs," and that the answer might criminate him, and that he was indicted, &c., &c., as set out in these exceptions, created such "a state of affairs (R., 23) as should have put the assignee and his creditors on inquiry" as to the alleged fraudulent sale, and that the duty of the assignee was to resort to all means, put by the law in his hands, to *then* find out such fraudulent sales; and that hence, having had the knowledge in 1876, which should thus have "put him on inquiry," it follows, *as a matter of law*, that he had, in 1876, knowledge of the fraudulent sales, and therefore there was no concealment such as would deliver from the two years' bar.

Two propositions we submit as to these exceptions—

1. Where such facts are disclosed to the assignee, as these exceptions show came to his knowledge in 1876, relating to the bankrupt's conduct and disposition of his property, and which facts are for the purposes of these exceptions to be assumed as indisputably known to the assignee, then it was and is a question of law to be decided by the court, and not by the jury, as to whether such knowledge of such undisputed facts is sufficient to put the assignee on inquiry, and to fix upon him actual knowledge of what due diligence would have disclosed regarding fraudulent sales; and

2. That when the assignee was thus put on inquiry as to the alleged concealment of fraudulent sales to defendant, he became bound to resort to all reasonable means to find out about such fraudulent sales, and if he did not do so then the law attributes to him actual knowledge of these frauds, and hence there was no escape from the two years' bar.

That when the facts are undisputed as to how much knowledge the assignee had tending to put him on inquiry, it becomes a question of law as to whether these facts are enough to have, in law, that effect, we think very plain.

Whether a given state of undisputed facts constitute due diligence, or are enough to put a party on inquiry, can never be submitted by the court to the jury.

Bank *vs.* Lawrence, 1 Pet., 587.
Bank *vs.* Swan, 9 Pet., 33.
Rhett *vs.* Poe, 2 How., 457.
Harris *vs.* Robinson, 4 How., 336.
U. S. *vs.* Barker, 1 Paine, 156.
Orr *vs.* Lacy, 4 McL., 243.
Walson *vs.* Tarpley, 18 How., 517.
Diercks *vs.* Roberts, 13 S. C., 338.

It was utterly impossible for the assignee to deny his knowledge of the facts as to refusing to answer, &c., regarding the bankrupt's conduct in 1876, to which he swore as then known to him. The court was asked to charge, as a matter of law, that these put him "on inquiry," but the court refused and left that to the jury.

This, we think, was error.

Then as to the point that one put "on inquiry" as to a fact is in law held to know the fact, unless he uses all reasonable means to follow up the fact, the case of Walburn *v.* Babbitt, 16 Wall., 577, decides the point. There a purchaser from a bankrupt was shown to have such knowledge of facts regarding the sale to him being one in fraud of the bankrupt law as "put him on inquiry" as to the character of the sale, and this court held that the law would *attribute* to him knowledge of the fraud unless he should show (to here adopt the words of this court) that he had resorted to "all reasonable means in good faith" to discover the true facts.

Applied to the present case, the assignee had the means, in the machinery of the court and otherwise, to discover the alleged fraudulent transfers. He had been put on inquiry, and the court was requested to instruct the jury that he ought to have resorted to these means. Otherwise knowledge of the alleged fraudulent sales is by the law attributed to him.

This instruction the court refused to give and left these questions of law to the jury, which we think was error.

In the sixth bill of exceptions these same points are again covered, and the court's instructions on the point are fully set forth and contain much good law. But we think these instructions do not cure the defects covered by the fourth and fifth bills of exceptions in this, to wit, that since the law is, as expressed by this court, (16 Wall., 582,) that "*all reasonable means, pursued in good faith, must be used for the purpose of finding out*" how the bankrupt disposed of his

property; and since in 1876 the assignee was a lawyer, and then had brought to his knowledge that the bankrupt was indicted for fraudulent disposition of property, (R. 22,) and that he refused further to answer, and that further answer was readily obtainable, therefore the assignee was put on inquiry as to the alleged frauds with defendant, and as a matter of law he ought to have used the "*reasonable means*" of compelling him to answer as to all sales, &c.; that having failed to use the reasonable means, as is undisputed and admitted, therefore, as a matter of law, there is attributed to him knowledge of what could have been ascertained had the assignee compelled further and full answers.

In all three of these bills of exceptions, four, five and six, the court ignores the point of law that the *admitted facts*, confessed to have been known to assignee, show that the assignee omitted to adopt some of the most "reasonable," easy, and certain means of discovering, within the two years, the thing alleged to have been concealed, and hence knowledge of the thing concealed is attributed to the assignee.

It was the duty of the court to instruct the jury that the conduct of Carney, as set out in exceptions Nos. 4 and 5, "put assignee on inquiry" as to all fraudulent sales; that to have compelled full answer was a "reasonable means" of finding out these frauds, and if he failed so to do, then the law attributes to him knowledge, at the time he was so put on inquiry, of such frauds.

There are other errors assigned, but we submit these to the court without further comment in this brief.

SHELLABARGER & WILSON.



111-185

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

JOSEPH ROSENTHAL,
Plaintiff in Error.

vs.

PRESTON PLAYER, Assignee in Bankruptcy of THOMAS CARNEY,
Defendant in Error.

No. 276.

In Error to the Circuit Court of the United States for the District of Louisiana.

STATEMENT, BRIEF AND ARGUMENT,

OF DEFENDANT IN ERROR.

CHESTER H. KRUM,
For Defendant in Error.

LEVISON & BLYTHE STATIONERY CO. PRINT, ST. LOUIS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

JOSEPH ROSENTHAL,

Plaintiff in Error,

vs.

PRESTON PLAYER, Assignee in Bankruptcy of THOMAS CARNEY,

Defendant in Error.

STATEMENT OF THE CASE.

On *December 30, 1879*, the present suit was begun in the Circuit Court for the District of Louisiana.

The petition avers that on *October 20, 1875*, proceedings in bankruptcy were begun against Thomas Carney in the Eastern District of Missouri, at the suit of persons who constituted one-fourth in number and one-third in value of all the creditors of said Carney.

On *March 18, 1876*, Carney was adjudicated bankrupt. Subsequently the defendant in error was duly chosen assignee, his selection was approved by the Court and the Register conveyed to him the estate of the bankrupt in conformity with the statute.

The petition avers, that between *July 20, 1875*, and *August 23, 1875*, the bankrupt, who was *then insolvent*

and in contemplation of insolvency, intending *to defeat the object and to impair and hinder the operation of the bankrupt laws*, made payments of money to the plaintiff in error, which aggregated thirty thousand dollars, which were received by the plaintiff in error when he had *reasonable cause to believe the bankrupt to be insolvent and to be acting in contemplation of insolvency*, and when he *well knew* that such payments were made on the part of the bankrupt *to prevent such money from being distributed under the bankrupt laws, to defeat their operation and to evade their provisions.*

The petition avers, further, that on *June 22, 1875*, the bankrupt was *insolvent and in contemplation of insolvency*, as the plaintiff in error had *reasonable cause to believe;* that *with intent to defeat the operation of the bankrupt laws, to prevent such property from being distributed under those laws, and in order to impair, impede and hinder the operation, and to evade the provisions* of said laws, as the plaintiff in error *well knew*, the bankrupt, on *June 22, 1875*, sold and transferred certain boots and shoes of the value of forty-five thousand dollars, to the plaintiff in error; and that on *July 20, 1875*, the plaintiff in error, to effectuate the fraudulent transfer, agreed that the bankrupt should have an equal interest with himself in the goods so conveyed, and accordingly recognized and admitted such interest.

The petition avers, further, that on *July 22, 1875*, certain other merchandise was conveyed and transferred by the bankrupt to the plaintiff in error, and such averments as to the intent of the bankrupt and the knowledge of the plaintiff in error are made as are necessary to constitute a cause of action. It is also averred, that

it was agreed between the bankrupt and the plaintiff in error, that the former should retain a half interest in the property thus transferred, and that between *July 20, 1875*, and *March 1, 1876*, the plaintiff in error sold and converted the property to his own use.

The petition avers, also, that both the bankrupt and the plaintiff in error "*kept concealed*" from the defendant in error, "*the fact of the said payment and transfer of the said aggregate sum of thirty thousand dollars hereinbefore mentioned and of all the component parts thereof*," and also "*kept concealed from him the fact of the sale, transfer and conveyance of the said goods and merchandise hereinbefore set forth*," and that the defendant in error did not *obtain knowledge and information of said matters, or of either of them, until November 29, 1879*, when for *the first time* the said matters were *disclosed to him and brought to his knowledge.*

Upon the return day of the summons under the foregoing petition, the plaintiff in error appeared and excepted to the petition upon the following grounds:

First. That, as appeared from the petition, suit had not been brought within two years from the time that the causes of action accrued, if the same accrued at all.

Secondly. That the sale, transfer and conveyance of five hundred cases and parts of cases of boots and shoes, alleged to have been made by the bankrupt to the plaintiff in error on the 22d day of June, 1875, was not made, if made at all, within three months before the filing of the petition against the bankrupt.

Upon these exceptions the Court adjudged that as to the first ground the same be dismissed; that as to the second ground the exception be dismissed, so as not to

"Thomas Carney, a witness for the defendant in error, having testified that while he was in St. Louis and the plaintiff in error in New Orleans, several letters had been sent and received by each to the other, and having produced certain letters purporting to have been addressed by the plaintiff in error to the witness, and which witness testified he had received through the mails, and which were offered in evidence and read to the jury, the witness then produced certain letter-press copies of letters which he testified that he had written in St. Louis and addressed to the defendant in New Orleans, and had mailed them with his own hands in the post-office at St. Louis, addressed to the proper address of defendant at New Orleans, postage prepaid."

Counsel for defendant in error thereupon offered said letter-press copies of letters in evidence. Whereupon the counsel for plaintiff in error objected to the introduction of said letter-press copies on the ground:

First. That the defendant in error had called upon the plaintiff in error to produce the originals of said letters by subpœna *duces tecum*, to which plaintiff in error had made a regular return under oath in which said plaintiff in error swore, that he never received the originals of said copies.

Secondly. Because there was no evidence whatever offered to the jury that plaintiff in error had ever received such letters, and that said copies of said letters were not admissible against the plaintiff in error until he had been proved to have received the original thereof. These objections were overruled by the Court, which held that the foregoing evidence having been offered, the question of the receipt of the letters was for the jury; to which ruling plaintiff in error excepted.

A fourth bill of exceptions, found on page 21 of the Record, shows that the defendant in error, having been sworn as a witness in his own behalf, admitted that he was a member of the bar of St. Louis; that he had been

duly elected assignee of the bankrupt; had been one of the solicitors of the prosecuting creditors; also, had forced the bankrupt into bankruptcy, and that, in pursuance of his right as assignee, he had, in May, 1876, subjected the bankrupt to an examination pursuant to the provisions of the Bankrupt Act, at which said bankrupt, after having testified at great length, finally refused to answer any other questions relating to his property or affairs, on the ground that his answers might criminate him, as there was an indictment for a criminal offense under the bankrupt laws of the United States then pending against him; that thereupon said examination ceased, and defendant in error took no further steps to compel said bankrupt to answer, because he thought it would be better not to press him at that time, and the defendant in error did not again examine the bankrupt until November, 1879; thereupon counsel for plaintiff in error moved the Court to charge the jury as follows:

"If the jury find that there was an examination of the bankrupt by the assignee in May, 1876, at which the said bankrupt refused to answer any question relating to his property or affairs, then such conduct of the said bankrupt was contempt of the Bankrupt Court, and it was the duty of the assignee, plaintiff herein, to have brought the sale to the attention of said Court, and his neglect to do so was reprehensible, and had he done so the Bankrupt Court could have compelled the bankrupt to answer."

But the Court refused to give the latter half of said charge, employing in its refusal the following language:

"So far as that request to charge states that it was in the power of the assignee to have brought Rosenthal and Mr. Carney's failure to answer to the attention of the Court and compelled them to answer, I give you that instruction, but as to the inference that is made here, that he was reprehensible for not doing so, I refuse that part of the instruction. His motives in not taking that course may have been entirely proper."

To this action of the Court the plaintiff in error excepted.

A fifth bill of exceptions, found on page 22 of the Record, shows that the defendant in error having been sworn as a witness in his own behalf, and having testified as already set forth, in bill of exception number four, and there being no contradictory evidence on this subject, the Court was moved in behalf of the plaintiff in error to charge the jury as follows:

"That the refusal of the bankrupt to testify further in connection with what he had already sworn to, which is made part of this bill, created such a state of affairs as should have put the assignee and creditors on inquiry; they had the whole effective machinery of the bankrupt law within their reach to investigate and sound to the bottom every business transaction in which the bankrupt had been engaged for years before the adjudication, and if the assignee did not avail himself of said effective machinery within the two years prescribed by the Bankrupt Act, he cannot maintain this action if he brought it after said two years elapsed."

But the Court refused to charge the jury as above requested, and in lieu thereof charged them as follows:

"You are the judges of all the facts of this case. This instruction assumes that at a certain period of time such influence should have arisen in the mind of the assignee. So far as it assumes any fact I decline to give it, and I shall leave the whole question of prescription or no prescription to be determined by you. It is undoubtedly true that if he was put upon inquiry as a reasonable man, which he refused to follow up, and which, if you found as a fact, if he had followed up would have led to a knowledge, then the statute would have been a bar. But it is for you to say whether, upon all the evidence, there has or has not been such concealment, and so continued as would qualify the rule as to prescription."

To this ruling the plaintiff excepted.

A sixth bill of exceptions, found on page 23 of the Record, shows that at the trial in behalf of the plaintiff in error, the Court was requested to charge the jury as follows:

"1st. That under the provisions of the Bankrupt Act of the United States, the assignee of a bankrupt may at any and all times obtain orders upon the bankrupt and other persons whom said assignee shall designate to attend and submit to examinations on oath upon all matters relating to the disposal or condition of the property of the bankrupt, or to his trade and dealings with others, and to all other matters concerning the property of said bankrupt and his estate and the due settlement thereof; that the Bankrupt Court, upon due application by the assignee, has the power under the law to compel the attendance of the bankrupt or any other person by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the Court or before a register in bankruptcy for examination as a witness, and that under said Bankrupt Act the Bankrupt Court has the power to compel the bankrupt or any such other person summoned for examination to answer all proper questions relating to said bankrupt's property, to its disposal, etc., and in the event of refusal to answer such proper questions by said bankrupt or such other persons, said Bankrupt Court has the power to commit him or them to prison until they shall so answer, and the District Court of the United States for the District of Missouri had all of these powers in 1875, and from then until now."

But the Court refused to give such charge, except with qualifications, in the following words:

"I give you that instruction as a proposition of law, or rather as a series of propositions of law, but I think it is proper for me to say that though I give it, I do not mean to say that it shall be applied to this case as an abstract proposition without considering very carefully the circumstances of the case.

"The same, as a proposition of law, is true. But there are other propositions of law which you must consider in connection with that, when you consider it in its application to this case. The propositions I shall give you when I come to speak in a narrative form of the case."

The Court was further requested to charge the jury as follows:

"2d. The bankrupt is compelled, under the law, when on examination, to answer all questions, even, if so doing, he should criminate himself."

The Court refused this charge in the following words: "I give you that instruction with the same remarks as I have given in connection with the first."

Whereupon the Court, in narrative form, charged the jury as follows.

"The statute says that a suit of this sort must be brought within two years from the time that the cause of action has accrued, but the extent and meaning of that statute is not that those who defraud others shall profit by the statute, not that any three or four men can go into a conspiracy and conceal industriously and studiously all cause of action from the assignee, and finally he exhumes it and brings his action within two years from that discovery; if he has used due diligence, the statute does not conclude him, you have to say that, and it being conceded more than two years elapsed since the springing up of the facts out of which this cause arose, the question is, was the action brought within two years from the time when the plaintiff or the assignee ought, by due diligence, to have discovered it. Now due diligence may lead to the discovery of some things and not to others. You cannot lay down any arbitrary rule and say that a man should have found out this or should have found out that; if there is a deed recorded, and the assignee does not find it out, there may be proof of want of due diligence, but where, from the nature of the transaction, it is covered and secreted, and if you find as a fact that the transaction was covered up by what was apparently just and proper, and that books were written out that were just and proper apparently, and that the fraud was in its nature one which rested, therefore, in the bosom of Carney, and those who aided him to perpetrate it; if you find the fraud to be a fact, then the Court instructs you that you have to deal with a cause where you might have to be much more tolerant with reference to the statute of limitations or prescription, as we term in this state. The claim of the plaintiff is, that here was a gross fraud upon the creditors perpetrated by Carney, and aided by Meyer, Stern, and Rosenthal. Except by probing the conscience of these people, how could he ascertain that? That is the question for you to decide, and to see if he omitted anything.

"The counsel for defendant have urged with a great deal of force, that at a certain time in this transaction disclosures were made. You must take all that exactly as the evidence adduced before you has shown, and state whether there was due diligence. But the Court instructs you that if you find as a fact that this assignee did use all of the threads which a reasonable man in the discharge of his duty could have availed himself of, and that he failed, not by reason of any want of diligence on his part, but the wilful turpitude of those who were engaged in this transaction. If you find that to be the case, this Court instructs you, that if he did, after making the discovery, bring the suit within two years, that his right to recover is not barred, and whether it was one or the other of these cases, it is for you to say whether it is a case where this assignee has failed

to make the discovery because he did not use due diligence or whether it is a case where, using due diligence, he failed to make the discovery because the parties to the transaction, who were already the repositories of its existence, one or more of them wickedly concealed it and filed oath upon oath in affecting that concealment. For the Court instructs you that if you find that here was this conspiracy entered into to appropriate this property in fraud of the Bankrupt Act, in fraud of the creditors, and if you find that the defendant knew that Carney was making these false statements under oath, and assented to them and aided them by implication or by direct statements, that they are to that extent the acts of the defendant."

The Court was also requested to charge the jury as follows:

"The fact that the assignee did not discover his right to certain property of the bankrupt until after the expiration of two years from the time an action accrued to him therefor, does not remove the bar prescribed by the bankrupt. The law makes no exception."

But the Court refused to give such charge, except with qualifications, in the following words:

"That proposition is true as a general proposition, but it has a qualification, which is, that if the party against whom a suit is brought or against whom a right is claimed, concealed the cause of action so that the assignee could not by reasonable diligence have ascertained it, and if he brought the action within two years from the time, when, after the exercise of due diligence, he did discover the cause of action thus concealed, then the statute is no bar."

A seventh bill of exceptions, found on page 26 of the Record, shows, that upon the hearing of the rule for a new trial, counsel for plaintiff in error offered to put upon the stand B. G. Barton and Thomas Wiltz, as witnesses to prove that they had been members of the jury which tried the case, and that, as alleged in said rule, in arriving at their verdict the said jury were guilty of misconduct and irregularities in this, that in arriving at the amount of their verdict, the jury agreed that each juror should mark the sum he found, and that the sum found, by dividing the total amount by twelve, should be the

amount of the verdict, which was accordingly done. But the defendant in error objected to the admission of such evidence, on the ground that a juror could not be heard to impeach his own verdict, and the Court sustained the objection.

The jury found in favor of the defendant in error, assessing the damages in the sum of $17,500, with five per cent. interest per annum from December 30, 1879.

The plaintiff in error having made an ineffectual attempt to obtain a new trial, the case comes before this Court upon a writ of error.

BRIEF.

I.

The exceptions to the petition were waived by answering to the merits.

a. Exceptions filed January 20, 1880. (Record, page 11.) Overruled. Plaintiff in error answered to merits by general denial, March 3, 1880. (Record, page 12.)

b. Settled Rule, that answering over, after demurrer has been overruled, waives such demurrer.

United States vs. *Boyd*, 5 How. 51.
Evans vs. *Gee*, 11 Peters. 85.
Clearwater vs. *Meredith*, 1 Wall. 42.
Bell vs. *Railroad*, 4 Wall. 602.
Aurora City vs. *West*, 7 Wall. 92.
Stanton vs. *Embrey*, 93 U. S. 553.

II.

Record shows judgment was for right party. Such errors as may have been committed worked no injury.

Error must have worked injury to constitute ground of reversal.

Decatur Bank vs. *St. Louis Bank*, 21 Wall. 301.

State of Record.

First. As to the pleadings:

a. Defendant in error sues as assignee in bankruptcy of Thomas Carney. *Suit begun December* 30, 1879. Petition admits that suit not begun within two years from perpetration of fraud.

Revised Statutes, sec. 5057.
Bailey vs. *Glover*, 21 Wall. 349.

b. Petition avers:

1. Bankruptcy proceedings begun *October* 20, 1875.

2. Between *July* 20, 1875, and *August* 23, 1875, fraudulent payments of money by bankrupt to plaintiff in error of $30,000—with necessary averments of intent and knowledge.

3. On *June* 22, 1875, fraudulent sale of boots and shoes to extent of $45,000, and partnership arrangement made in same stock, *July* 20, 1875, between bankrupt and plaintiff in error—with necessary averments of intent and knowledge.

4. Further fraudulent sale, *July* 22, 1875, of other merchandise—with necessary averments of intent and knowledge.

5. Averment to avoid bar of statute—two years. That both bankrupt and plaintiff in error *kept* fraud *concealed* from defendant in error until November 29, 1879.

Answer—general denial and plea of limitation under *Section 5057.*

Points on above matters.

1. Petition sufficient under:
   Bailey vs. *Glover*, 21 Wall. 342.

2. Section 5057, Statute of Limitations to be reasonably construed.
   Gifford vs. *Helms*, 98 U. S. 252.
   Upton vs. *McLaughlin*, 105 U. S. 643.

3. Defendant in error not bound to state evidence.
   Ind. R. R vs *Horst*, 93 U. S. 297.

4. But whatever defects may be found in petition cured by verdict.
   Brent vs. *Bank*, 1 Pet. 93.
   Lincoln vs. *Iron Co.*, 103 U. S. 415.
   Stockton vs. *Bishop*, 4 How. 155.

At trial, Court struck out supplemental pleading, which averred knowledge of fraud on part of defendant in error.

But not error. General denial filed *March* 3, 1880. Supplemental answer filed *on trial*, *January* 17, 1881. Too late.
A mere traverse at best and general denial with plea of limitation already filed.
Furthermore, Court permitted free inquiry as to all facts pertinent under supplemental answer. (Record, page 15.)

Secondly. As to rulings upon evidence.

1. Bill Exceptions Two. (Record, page 15.)

Court admitted depositions showing sale of boots and shoes, June 22, 1875, but did so, on state-

ment of counsel, that a subsequent reinvestment of interest in bankrupt would be shown.

Whole evidence not in bill, Partnership arrangement July 1, 1875. (Record, page 50, Exhibit D.)

Mays vs. *Fritton*, 20 Wall. 420.

2. Bill Exceptions Three. (Record, page 17.)

Court admitted certain letter-press copies of letters from bankrupt to plaintiff in error.

But notice given to plaintiff in error to produce. He denied having received originals. Bankrupt testified, that he mailed originals—postage prepaid—to address of plaintiff in error.

Copies competent evidence.

Howard vs. *Daly*, 61 N. Y. 366.
Dana vs. *Kemble*, 19 Pick. 112.
Huntley vs *Whittier*, 105 Mass. 392.
United States vs. *Babcock*, 3 Dill 573.

Thirdly. As to instructions.

1. Instructions asked, but refused; found in Bills of Exceptions 4 and 5 (Record, pages 21, 22 and 23), and 6 (Record, pages 23, 24, 25 and 26).

2. No error. Instructions asked mere abstract propositions, and for most part erroneous as such propositions.

Whole case under rule in *Bailey* vs. *Glover*, submitted under instructions given.

Law vs. *Cross*, 1 Black. 537.
Schools vs. *Risley*, 10 Wall. 115.

III.

Refusal of Court to admit jurors to impeach their verdict, was not error.

1. Bill Exceptions Seven. (Record, page 26.)

Plaintiff in error offered to prove by certain jurors, that verdict was obtained by lot. Court refused to hear the evidence

2. This on motion for new trial — but grounds of motion not in record.

3. Offer of proof did not exclude hypothesis that jurors were left free to decide, notwithstanding scheme of "chalking."

Harvey vs. *Rickett*, 15 Johns. 87.
Dorr vs. *Fenno*, 12 Pick. 527.
Miller vs *R. R.*, 5 Mo. App. 476.

4. Evidence of jurors incompetent to impeach verdict.

State vs. *Freeman*, 5 Conn. 351.
Meade vs. *Smith*, 16 Id. 355.
Withers vs. *Fiscus*, 40 Ind. 131.
Woodward vs. *Leavitt*, 107 Mass 453.
State vs. *Underwood*, 57 Mo. 52.

5. Exception merely to action of Court under motion for new trial—not open to review.

Laber vs. *Cooper*, 7 Wall. 571.

Upon the whole record, the judgment will be found to have been for the right party. The whole case involved nothing but a question of fact, upon which the jury found against the plaintiff in error. Upon the whole record, the defendant in error is entitled to an affirmance of the judgment.

ARGUMENT.

I.

The exceptions to the petition, filed January 20, 1880, which are to be found on page eleven of the Record were waived by answering to the merits.

There is no departure from this rule under the repeated decisions of this Court.

In *United States* vs. *Boyd*, 5 Howard, 51, it is said:

"The counsel for the defendants ask the Court to revise the judgment of the Court below, rendered upon the demurrer to the rejoinder of the defendants' to the plaintiffs' amended replication, overruling the demurrer, insisting that the rejoinder was good and that judgment should have been rendered for the defendants.

"The answer to this is, that the withdrawal of the demurrer and going to issue upon the pleading, operated as a waiver of the judgment. If the defendants had intended to have a review of that judgment on a writ of error, they should have refused to amend the pleadings and have permitted the judgment on the demurrer to stand."

In *Evans* vs. *Gee*, 11 Peters. 85, counsel for the plaintiff in error contended for the reversal of the judgment, on the ground of sundry irregularities in the progress of the cause in the Court below, apparent on the record. Among them was the objection, that a general demurrer had been filed, which had not been disposed of. But this Court said:

"These irregularities, whatever might have been their original imperfections, if not waived, were in our opinion waived by the defendant going to trial upon the merits, and cannot now constitute any objection upon the present writ of error. For a writ of error does not bring up for review any irregularities of this sort."

In *Clearwater* vs. *Meredith*, 1 Wall. 42, the plaintiff claimed the right to have the decision of the Court below

on the sufficiency of certain replications which had preceded those on which issue had been joined, reviewed by this Court. But the claim was disposed of in the following terms:

"This he cannot do. Each replication in this case is complete in itself; does not refer to and is not a part of what precedes it, and is new pleading. When the plaintiff replied *de novo*, after a demurrer was sustained to his original replication, he waived any right he might have had, to question the correctness of the decision of the Court on the demurrer."

In *Bell* vs. *Railroad Company*, 4 Wall. 602, this Court found great confusion in the record in relation to the disposition of demurrers and pleas in abatement, but held, that as Bell "filed a plea to the merits and the parties went to trial, all antecedent irregularities were waived."

So in *Aurora City* vs. *West*, 7 Wall. 92, it was held, that:

"Pleading over to a declaration, adjudged good on demurrer, is a waiver of the demurrer, and when a defendant files a rejoinder to a replication, previously adjudged good on demurrer, his act in pleading over must be for the same reason held to have the same effect."

The unbroken line of adjudications on this point was again extended by the Court in *Stanton et al.* vs. *Embrey*, administrator, 93 U. S. 553, where Mr. Justice *Clifford* said:

"Authorities are referred to by the defendant in error, which support the proposition, that pleading over to a declaration which has been adjudged good on demurrer is a waiver of the demurrer; and there are many other decided cases to the same effect.

It follows from the foregoing adjudications, that this Court will not review the action of the Court below on the exceptions filed to the petition. No motion in arrest was filed below. The plaintiff in error demurred but abandoned his demurrer, when he pleaded over to the merits.

II.

The record shows, that the judgment must have been for the right party. The writ of error places before the Court a record which demonstrates, that such errors as have been committed (if any are found), worked no injury and hence afford no ground for reversal.

In *Decatur Bank* vs. *St. Louis Bank*, 21 Wall. 301, this Court announced, that:

> "*To warrant the reversal of a judgment there must be not only error found in the record, but the error must be such as may have worked injury to the party complaining.*"

This announcement simply reiterates repeated declarations to the same effect in all of the cases, where the point has been presented for determination.

What does the record show?

First. As to the pleadings.

The petition admits, that the defendant in error did not sue within two years next succeeding the fraud upon the Bankrupt Act.

Section 5057 Revised Statutes provides:

> "No suit, either at law or in equity, shall be maintainable in any Court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

Under this Statute, this Court has held in *Bailey* vs. *Glover*, 21 Wall. 349, that:

> "Where there has been no negligence or laches on the part of a plaintiff, in coming to the knowledge of the fraud, which is the foundation of the suit, and where the fraud has been concealed, or is of such

character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to the party suing, or those in privity with him."

The rule is applied to cases at law as well as to cases in equity.

In the case referred to, which was in equity, after alleging various facts constituting frauds upon the Bankrupt Act, the bill alleged further:

"That the bankrupt and his wife, son and father-in-law"—these being defendants in the case—"kept secret their said fraudulent acts, and endeavored to conceal them from the knowledge both of the assignee and the said Winston & Co." (the creditors of the bankrupt), "whereby both were prevented from obtaining any sufficient knowledge or information thereof until within the last two years, and that even up to the present time, they had not been able to obtain full and particular information as to the fraudulent disposition made by the bankrupt of a large part of his property."

In the present case, proceedings in bankruptcy against Carney were begun on the twentieth of October, 1875.

Frauds upon the Bankrupt Act are averred as follows:

1. Between the twentieth day of July, 1875, and the twenty-third day of August, 1875, payments of money, aggregating thirty thousand dollars, by the bankrupt to the plaintiff in error—this averment being accompanied by all necessary averments as to insolvency and fraudulent intent of the bankrupt and knowledge of the plaintiff in error.

This constitutes a complete cause of action. The fraud was perpetrated within three months next before the institution of proceedings in bankruptcy.

2. A sale on the twenty-second day of June, 1875, by the bankrupt to the plaintiff in error of certain boots and shoes worth forty-five thousand dollars, and a part-

nership arrangement between the vendor and vendee, made on the twentieth day of July, 1875, which secured to the vendor an interest in the property sold—averments accompanied by all essential allegations as to the insolvency and intent of the vendor and the knowledge of the vendee.

3. A sale on the twenty-second day of July, 1875, by the bankrupt to the plaintiff in error of certain whisky, lye, soda and canned goods of the aggregate value of fifteen thousand four hundred dollars—the averments as to sale being accompanied by all necessary allegations in regard to intent, insolvency and knowledge.

There is no room for controversy that each of the two last specifications of fraud upon the bankrupt constitutes a complete cause of action.

But this suit was begun on the thirtieth day of December, 1879. Accordingly the petition avers, in order to avoid the bar of the statute, that:

Both the bankrupt and the plaintiff in error *kept concealed* from the defendant in error, "*the fact of the said payment and transfer of the said aggregate sum of thirty thousand dollars hereinbefore mentioned, and of all the component parts thereof*," and also "*kept concealed from him the fact of the sale, transfer and conveyance of the said goods and merchandise hereinbefore set forth*," and that he, the defendant in error, "*did not obtain knowledge and information of said matters, or of either of them, until the twenty-ninth day of November, 1879, when for the first time said matters were disclosed to him and brought to his knowledge.*"

If, after the abandonment of the demurrer below and where no motion in arrest was interposed, this Court

will consider whether the petition states a cause of action, I respectfully submit, that the averment that the plaintiff in error kept the fraud concealed is a complete avoidance of the bar of section 5057.

The petition was drawn with special reference to the decision of this Court in *Bailey* vs. *Glover*, 21 Wall. 342. There section 5057 was held to be applicable as well to suits at law as to suits in equity. In the principal case the bill contained a "*distinct allegation*" that the defendants "*kept secret and concealed*" from the parties interested, the fraud which was sought to be redressed. So, in the petition now being considered, the averment is that the plaintiff in error kept the fraud concealed from the defendant in error. It was not even necessary to have averred concealment on the part of the fraudulent vendor and vendee. The transaction was, in itself, one that concealed itself. This Court declared in the principal case, that:

> "To hold by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the Statute of Limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

The section is held to be merely a statute of limitations. It does not impose an absolute limit. "In construing *this* statute of limitation passed by the Congress of the United States as part of the law of bankruptcy (say this Court in the principal case), " We hold,

> "That where there has been no negligence or laches on the part of a plaintiff, in coming to the knowledge of the fraud which is the foundation of the suit, and where the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to the party suing, or those in privity with him."

Again, in the same case, at page 348, it is said:

"We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault, or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

This rule is also declared applicable to actions at law.

In *Gifford* vs. *Helms*, 98 U. S. 252, it was said that this section of the Bankrupt Act, like other statutes of limitation, must receive a reasonable construction. And in *Upton* vs. *McLaughlin*, 105 U. S. 643, the doctrine of *Bailey* vs. *Glover*, was reaffirmed in the identical language used by Mr. Justice Miller in the principal case.

I have called the attention of the Court to the fact, that the petition avers, that both the bankrupt and the plaintiff in error *kept the fraud concealed*. They kept it concealed from the defendant in error. How they kept it concealed it cannot have been necessary to aver, for the methods of concealment were only matters of evidence. Had all the evidence adduced at the trial been recited in the petition, this Court would hardly have felt called on to commend the pleading. The conclusion of fact — the concealment by the parties to the fraud — is averred in the petition. It necessarily involves a combination between vendor and vendee to prevent knowledge on the part of the defendant in error. No rule of good pleading demands anything further at the hands of the pleader. "The plaintiff was bound to state his case; but he was not bound to state the evidence by which he intended to prove it." *Indianapolis R. R.* vs. *Horst*, 93

U. S. 297. The very averment, that the parties to the fraud kept the fraud concealed, involves every element of fact necessary to avoid the bar of the statute. The pleading is identical, in point of substantial averment, with the bill in *Bailey* vs. *Glover*.

But, after all, a satisfactory answer to the objections to the petition is found in the verdict of the jury. The plaintiff in error demurred, was beaten and abandoned his demurrer. He joined issue upon a defective petition. Such is his argument. But the issue was determined against him, upon an averment of fraud which avoided the application of the statute. Was diligence required at the hands of the defendant in error? Then the jury must have found all necessary diligence—otherwise they could not have arrived at their verdict. Was the transaction one, whose nature kept it concealed? The jury must have so found.

In *Brent's Executors* vs. *Bank of the Metropolis*, 1 Peters. 93, a verdict having been rendered for the bank, the defendants in the Court below filed errors in arrest of judgment. One error alleged was, that the first count in the declaration neither charged a personal demand on the maker of the note sued on, nor excused the omission to make such demand. This Court disposed of the alleged error as follows:

"The declaration certainly does not charge a demand on the person of the maker, but this was not necessary, if the parties had agreed that a demand at the bank should be substituted for a demand on the maker. The plaintiffs in error contend, that the agreement is not alleged in the declaration, and we admit, that the omission to make this averment would be fatal. *In that event, the plaintiff below would have shown no cause of action.* But the declaration avers a demand of the note, 'at the Bank of the Metropolis,' where the said

note was payable. The note is set out in the declaration, and does not purport, on its face, to be made payable at the bank. But the averment in the declaration, that it was payable there, cannot be true, unless there was an agreement of the parties to that effect. It is an averment which must have been proved at the trial, or the plaintiff below could not have obtained a verdict and judgment. After a verdict, it is, we think, sufficient to sustain the judgment."

Let it be conceded, that averments of fact showing due diligence on the part of the defendant in error were essential to complete the petition. Let it be conceded that their omission constituted a defect in substance. Yet the writ of error is before this Court after verdict. The record affirmatively shows, that the jury were instructed to pass upon the issue of due diligence. The learned Judge below was most careful to elaborate that issue before the jury. He said — page 25 of Record — "The counsel for defendants have urged with a great deal of force, that at a certain time in this transaction disclosures were made," (meaning disclosures to the defendant in error.) "You must take all that exactly as the evidence adduced before you has shown, and state whether there was due diligence." * * * "It is for you to say, whether it is a case where this assignee has failed to make the discovery because he did not use due diligence, or whether it is a case, where, using due diligence, he failed to make the discovery because the parties to the transaction, who were already the repositories of its existence, one or more of them wickedly concealed it and filed oath upon oath in effecting that concealment." It would strike the average mind somewhat forcibly to suggest that a record of this description must indicate to a substantial degree, that the essential facts were found by the jury, in the absence of which they could not have reached a conclusion.

In *Lincoln* vs. *Iron Company*, 103 U. S. 415, which was an action upon municipal bonds, the declaration did not state that there had been an election, or that other preliminaries required by the law to precede the issue of the bonds had taken place. It was held, that after verdict such a defect could not be regarded as error.

"It is a rule of the common law, that where there is any defect or omission in a pleading, whether in substance or form, which would have been fatal on demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that the judge would have directed the jury to give the verdict, such defect or omission is cured."

The volumes of reports of decisions of this Court are replete with declaration after declaration, (from *Stockton* vs. *Bishop*, 4 How. 155, down to the present day), that the Judiciary Act requires the Courts of the United States to uphold every judgment which is "according to the right of the cause and matter in law."

The plaintiff in error had full opportunity below to demonstrate whether the defendant in error had been negligent in ferreting out an abominable fraud. He was heard in his own behalf as to all matters affecting his own connection with that fraud. After the verdict, he did have quite as much reason to exult as did the gallant Perry after he had met the enemy of his country. For the result demonstrated merely how widely divergent may be the notions of a party from the convictions of a jury. *Hinc illæ lachrymæ.*

The remaining exception to the action of the Court, in regard to the pleadings, results from the striking out of a part of the supplemental plea and answer.

The Record, page 12, shows that, in the first instance,

the plaintiff in error filed a general denial, by way of answer. *The date of filing was March 3, 1880.*

At the trial, *on January 17, 1881*, (Record, page 14), the plaintiff in error filed a plea of the statute of limitations and a supplemental answer which denied, that knowledge of the fraud was first acquired by the defendant in error on November 29, 1879, but averred, that he had "full knowledge of all transactions that ever took place between defendant and Carney, bankrupt, at the time said plaintiff was elected assignee." Thereupon, it was moved to strike out this supplemental plea on the ground that it came too late. The motion was sustained.

As amendments and supplemental pleadings are wholly within the discretion of the trial Court—at least such a supplemental pleading as that now being considered—it cannot require argument to demonstrate, that a party comes rather late, who remains inactive from *March 3, 1880, to January 17, 1881*, and recovers from his torpidity only upon the very day of trial and then only under the revivifying influences of actual procedure in Court.

But the First Bill of Exceptions effectually disposes of this matter. While the Court very properly struck out the supplemental answer, yet, (Record, page 15), "*during the trial no restraint was put upon the defendant in offering evidence as to the knowledge of plaintiff, as alleged in that part of the supplemental answer which was stricken out, and both sides offered evidence as to such knowledge, and the Court, upon this point, left it to the jury to say whether the action was commenced within two years from the time when the plaintiff knew, or by due diligence might have known of the cause of action.*" The

whole question, raised by the supplemental answer, was left open to the jury — the plaintiff in error introduced evidence as if the answer had not been stricken out, and he was beaten on the merits of the inquiry.

Surely one cannot be heard to complain of the action of a Court in striking out a supplemental pleading, when such Court afterwards allows the cause to proceed as if the supplemental pleading had never been disturbed. Especially must this be the case, when the supplemental pleading, at best, is but a traverse of the averments of the petition, which have already been put in issue by a general denial. It follows, that this ground of exception to the proceedings below is absolutely without merit.

Secondly. As to the rulings upon matters of evidence.

The Second Bill of Exceptions recites, (Record page 15), that depositions of Louis Temme and others, (which begin with page 27 of the Record), were objected to on the ground, that as they related to the sale of certain boots and shoes on *June 22, 1875*, (as alleged in the petition), they were irrelevant and incompetent because the transaction took place more than three months before the institution of proceedings in bankruptcy.

The objection was overruled. But in doing so, the Court stated, (Record page 17), that the facts and circumstances surrounding the case should be submitted to the jury, "and the facts of the sale on June 22, 1875, and its circumstances were allowed to be proved on the representation of counsel that said evidence was to be followed up by testimony *showing a subsequent investment of*

an interest in said goods by the bankrupt, by agreement with defendant."

What the evidence was, outside of these depositions, is not shown by the Record. But, under the settled rule of this Court, (*Mays* vs. *Fritton*, 20 Wall. 420), as such evidence is not before the Court, it must be assumed that the verdict is right. It must be assumed, that there was evidence tending to establish the fraudulent character of the sale of boots and shoes to the plaintiff in error on June 22, 1875. As far as concerns the reconveyance to the bankrupt of an interest in these goods, so as to make a case of continuing fraud down to within three months next before the institution of proceedings in bankruptcy, the Court will find satisfactory evidence in *Exhibit D*, to the depositions, (Record page 50):

"Office of Western Fertilizer and
"Chemical Works, No. 14 Main St.
"St. Louis, January 1, 1875.

"This is to certify, that the holder of this certificate "has deposited with me twenty thousand dollars, and for "the use of this money, I hereby agree that whoever may "hold this instrument shall become my partner to the "extent of one-third of the profits or losses of my auction "and commission business at No. 313 North Main Street, "St. Louis, Mo., and shall be allowed to draw from my "business three hundred dollars per month, commencing "*from July 1, 1875*, which shall continue as long as this "agreement shall be in force, which amount shall be "charged to expense account in the books in which my "business is kept. Whenever either party shall desire "to terminate this co-partnership, a notice of at least "three months shall be given."

"J. Rosenthal."

When the imagination of the impartial judicial mind supplies, in connection with this roving commission of partnership, the fact, that it was executed *July 1, 1875*, the presumption in favor of the verdict of the jury becomes persuasive even unto the degree of conclusiveness. When, for purposes of conjecture, the judicial mind is afforded the further probability, that the bankrupt, himself, was the transferee of this quasi-negotiable article of partnership, it will hardly be deemed extraordinary, I respectfully submit, that the jury felt warranted in finding that the plaintiff in error was not altogether innocent of the charge that he was instrumental in aiding the bankrupt in keeping his assets well hidden from his creditors and his assignee. At all events, the learned Judge below was undoubtedly impressed with the evidential force of the facts before the jury and himself. He refused to disturb the verdict.

A second ground of exception to the action of the Court below, on matters of evidence, is found in the Third Bill of Exceptions at page seventeen of the Record.

The bankrupt, himself, testified, that while he was in St. Louis and the plaintiff in error was in New Orleans, several letters were sent and received by himself and the plaintiff in error. The witness produced letters which had been written him by the plaintiff in error. He also produced letter-press copies of letters, which he testified he had written in St. Louis, and had mailed, postage prepaid, to the proper address of the plaintiff in error at New Orleans.

The Record (at page 21), shows, that the plaintiff in

error had been notified to produce the originals. He replied, under oath, that he had never received them.

The Court below held that under all these circumstances, whether the originals had been received was for the jury, and allowed the letter-press copies to be read in evidence.

In view of the rule of evidence established by all of the authorities, there can be no doubt as to the propriety of this action.

Thus, in *Howard* vs. *Daly*, 61 N. Y. 362–366, which was an action upon an alleged contract for employment and service, evidence showed that a proposal, in writing, was made by the defendant to the plaintiff for her services for the year 1869. The plaintiff testified, that she signed an acceptance on Saturday, April 13, 1870, and placed it in the letter-box of the defendant at his theater. The defendant admitted that this letter-box was sometimes used as a place for deposit of the duplicates of contracts made between him and the actors. He testified *that he never received* the papers, which the plaintiff asserted she deposited in the box. Upon this evidence, a referee found that a contract had been entered into between the parties.

Speaking for the Commissioners of Appeals, *Dwight*, Commissioner, says:

"The case may also be rested upon the fact, that there was evidence to lead to a presumption that the document reached the defendant, as it was placed in a receptacle considered by him to be a suitable one for the deposit of documents of this class. In the ordinary course of business it would reach the defendant, as he would be supposed to have competent attendants in charge to transact his business. His denial that he received it, simply raises a case of conflict of evidence, on which the referee has passed in the plaintiff's favor. In *Dana* vs. *Kemble* (19 Pick. 112), it appeared that it was the usage of a hotel to deposit all letters left at the bar in an urn

kept for that purpose, whence they were sent, almost every fifteen minutes throughout the day, to the rooms of the different guests to whom they were directed. It was held, that there was a presumption that a letter addressed to one of the guests, left at the bar, was received by him."

In *Huntley* vs. *Whittier*, 105 Mass. 392, it is said:

"The depositing of a letter in the post-office, addressed to a merchant at his place of business, is *prima facie* evidence that he received it in the ordinary course of the mails; and where there is no other evidence, the jury should be so instructed," (Citing many cases, among them being *Dana* vs. *Kemble*, *supra*.) "The presumption, so arising, is not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the Government will do their duty, and the usual course of business; and when it is opposed by evidence that the letter never was received, must be weighed with all the other circumstances of the case, by the jury, in determining the question whether the letter was actually received or not; and the burden of proving its receipt remains throughout upon the party who asserts it."

So, in *United States* vs. *Babcock*, 3 Dillon, 573, Judges Dillon and Treat announced that:

"Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known post-office address, prepaid, and actually deposited in the post-office, we concur, both of us, in the conclusion, adopting the language of Chief Justice Bigelow, in *Conner* vs. *Jeffries*, 7 Allen, 563, that this 'is evidence tending to show that such letters reached their destination, and were received by the persons to whom they were addressed.' This is not a conclusive presumption; and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters. 'A fact' (says Agnew, J., *Tanner* vs. *Hughes*, 33 Pa. St. 290), 'in connection with other circumstances, to be referred to the jury,' under appropriate instructions, as its value will depend upon all the circumstances of the particular case.'"

Thirdly. As to the Instructions.

The Fourth and Fifth Bills of Exceptions, which are to be found on pages twenty-one, twenty-two and twenty-

three of the Record, are based upon evidence of the defendant in error, that as one of the solicitors of the petitioning creditors, he had forced Carney into bankruptcy; that as assignee of Carney he had, in May, 1876, subjected the bankrupt to an examination, at which, after extended testimony given by him, the bankrupt had refused to answer further questions on the ground that his answers might criminate him (because of the then pendency of an indictment against the bankrupt), and that thereupon such examination ceased, and the defendant in error took no steps to compel the bankrupt to answer, and did not resume his examination until November, 1879.

Upon this evidence, ignoring every other feature of the case and all the other evidence of the defendant in error himself (which is not presented by these Bills of Exceptions), the plaintiff in error asked the Court below to charge:

First. See Bill of Exceptions number Four:—

That the conduct of the bankrupt, in refusing to answer, was contempt of the Bankrupt Court; that it was the duty of the defendant in error to have brought the same to the attention of said Court; that his negligence to do so was reprehensible, and had he done so the said Bankrupt Court could have compelled the bankrupt to answer.

It is manifest, that the charge ought not to have been given. Whether the bankrupt was ever in contempt was not in issue. Whether the defendant in error was to be reprehended for having failed to invite the Court in bankruptcy to assert its dignity, was very clearly not in

issue. And the prayer assumed that the defendant in error had been guilty of negligence — the very question which the jury had been sworn to determine. Accordingly the learned Judge below disposed of the matter as follows:

"So far as that request to charge states that it was in the power of the assignee to have brought Rosenthal and Mr. Carney's failure to answer to the attention of the Court and compelled them to answer, I give you that instruction, but as to the inference that is made here, that he was reprehensible for not doing so, I refuse that part of the instruction. His motives in not taking that course may have been entirely proper."

In the foregoing charge, the Court gave to the conduct of Carney and of the defendant in error its fullest possible significance. The jury were left to determine just what bearing such conduct had upon the question of diligence in discovering the fraud. The Court went even further for the benefit of the plaintiff in error than it was called upon, in view of the clear and positive announcement by this Court in the authoritative case of *Bailey* vs. *Glover*.

Secondly. See Bill Exceptions Number Five:—

That the refusal of the bankrupt to testify, created such a state of affairs as should have put the defendant in error and creditors upon inquiry; that they had the whole effective machinery of the bankrupt law within their reach to investigate every business transaction of the bankrupt, and that if the defendant in error did not avail himself of said effective machinery within the two years prescribed by the Bankrupt Act, he could not maintain his action, if he brought it after said two years had elapsed.

It is difficult to consider this charge with seriousness. Had the learned Judge, in the hurry of a heated trial, been led to have given the instruction it would have been palpable error. At best it is merely eulogistic upon the machinery of the Court in bankruptcy. It even attributes a somewhat alarming prepotency in the defendant in error as the tenant in common of this "effective machinery" with the creditors of the bankrupt.

Just what the creditors had to do with the question of diligence at the hands of the assignee, I fail to appreciate. But whether the machinery of the Court in bankruptcy was effective, or otherwise, had the defendant in error availed himself of the whole of it, he might still have been guilty of the most reprehensible negligence. So, on the other hand, because he did not so avail himself, such failure could not be conclusive on the question of negligence. Accordingly, the Court below told the jury:

> "You are the judges of all the facts of this case. This instruction assumes that at a certain period of time such inference should have arisen in the mind of the assignee. So far as it assumes any fact, I decline to give it, and I shall leave the whole question of prescription, or no prescription, to be determined by you. It is undoubtedly true, that if he was put upon inquiry as a reasonable man, which he refused to follow up, and which, if you found as a fact, if he had followed up, would have led to a knowledge, then the statute would have been a bar. But it is for you to say whether, upon all the evidence, there has or has not been such concealment and so continued, as would qualify the rule as to prescription."

This charge submits the whole question fairly and clearly to the jury. It is wholly unobjectionable. It is in entire consonance with the rule laid down by this Court as the true rule of construction of the Statute of

Limitations prescribed by the Bankrupt Act for actions by or against assignees.

The foregoing remarks dispose of the grounds of exception to the charge of the Court as evidenced by Bill of Exceptions Number Six. (Record, pages twenty-three, twenty-four, twenty-five and twenty-six.)

The instructions asked by the plaintiff in error, which are set forth in this Bill of Exceptions, were either abstract propositions of law and therefore to be condemned, or absolutely erroneous even as abstract propositions. But let it be conceded, that they were all good as abstract propositions, or as instructions applicable to the facts; still, the Court below covered the entire case by the instructions which were given, and the refusal of those asked cannot now be assigned as error. It was left to the jury to say whether the fraud had been concealed from the assignee and whether he had omitted any inquiry within his power to conduct, or which ought to have suggested itself to him as a man of diligence in the discharge of an official duty. Nothing further could have been required.

In *Law* vs. *Cross*, 1 Black. 537, this Court said, that a congeries of instructions, so called, amounting to the number of twenty-eight, were requested.

"The Court, without confusing the jury with a special answer to each one of these propositions, properly submitted the facts to the jury, and gave them instructions as to the law. A large number of these points, which involve questions of law, were ruled in the charge as requested by the counsel. The case was argued here, in some measure, as if it had been an appeal in admiralty, or a motion for a new trial. To comment on all the objections attempted to be raised in the case would be tedious and unprofitable. It will be sufficient to notice the real questions in the case, and the instructions given by the Court. If these were correct, the Court below

were not bound to answer specifically each question in the catechism, nor this Court to comment thereon "

So, in *The Schools* vs. *Risley*, 10 Wall. 115, it is said that:

" Where the instructions given to the jury are sufficient to present the whole controversy to their consideration, and they are framed in clear and unambiguous terms, it is no cause for the reversal of a judgment to show that one or more of the prayers for instruction presented by the losing party and not given by the Court were correct in the abstract, as the refusal of the Court to give the instructions as requested, under those circumstances, would not work any injury to the party making the request, and therefore cannot be regarded an error."

III.

The remaining ground of exception relates to the alleged misconduct of the jury. But it is evident that error cannot be assigned upon this part of the Record.

Bill of Exceptions Number Seven (Record, page 26), shows, that the plaintiff in error offered to prove by certain *members of the jury*, that in arriving at the amount of their verdict, the jury agreed "*that each juror should mark the sum he found, and that the sum found by dividing the total amount by twelve should be the amount of the verdict, which was accordingly done.*"

I respectfully submit that the foregoing does not constitute error.

First. There is nothing in the Bill of Exceptions to show that misconduct on the part of the jury was assigned as one of the grounds for a new trial. It is true, that the evidence of the jurors was not objected to on this ground, but none can tell for what reasons a new trial was prayed.

Secondly. Assuming that the evidence of jurors may be received to impeach a verdict, which is the result of "chalking," or lot, yet the offer of proof did not go far enough. The offer was to prove, merely, that each juror should mark the sum he found, that the aggregate should be divided by twelve and the result be the amount of the verdict. But the offer excluded, wholly, the hypothesis that after the average had thus been made, each juror

might have considered and fully assented to the amount thus ascertained. In other words, it was not offered to prove, that the total amount divided by twelve should, without alteration, be the amount of the verdict. The distinction is clearly observed in all of the cases, where verdicts, alleged to have been obtained by lot, have been considered. Thus, in *Harvey* vs. *Rickett*, 15 Johns. 87, where the misconduct was admitted, a verdict was held to be irregular where it was agreed that each juror should mark the sum he found and that the total amount divided by six should, *without alteration*, be the amount of the verdict. But, as was held in *Dorr* vs. *Fenno*, 12 Pick. 527 (followed by the St. Louis Court of Appeals in *Miller* vs. *St. Louis R. R.*, 5 Mo. App. 476), "the impropriety consists in the *agreement* to be *bound* by the result." There was nothing in the offer of proof to exclude the hypothesis, that notwithstanding the method adopted to obtain a result, yet each juror was still left free to accept or reject such result. There was no offer to prove that the result obtained was to be unconditionally binding upon all of the jurors.

Thirdly. There is no rule more emphatically settled in England and the United States, than that the evidence of jurors will not be received to impeach their verdict.

In *State* vs. *Freeman*, 5 Conn. 351 (affirmed in *Meade* vs. *Smith*, 16 Conn. 355), Chief Justice *Hosmer* said that:

"On a principle of policy, to give stability to the verdicts of jurors, and preserve the purity of trials by jury, the evidence ought not to be admitted. The reasons assigned by Sir *James Manfield*, in *Owen* vs. *Warburton*, and Ch. J. *Swift*, in his Digest, are of great weight. The sanctioning of the testimony of one juror, relative to the misbehavior of the rest, would open a door to the exercise of the

most pernicious acts, and hold before the friends of one of the parties, the most dangerous temptation By this capacity of penetrating into the secrets of the jury-room, an inquisition over the jury, inconsistent with sound policy, as to the manner of their conduct and even as to the grounds and reasons of their opinions, might ultimately be established to the injury and dishonor of this mode of trial; imperfect undoubtedly, but the best that can be devised. And under the guise of producing equity, there might be generated iniquity, in the conduct of jurors, more to be deplored than the aberration from law, which, undoubtedly, sometimes takes place. The opinion of almost the whole legal world is adverse to the reception of the testimony in question; and in my opinion, on invincible foundations."

In *Withers* vs. *Fiscus*, 40 Ind. 131, it is declared to be a general rule in Indiana, that the affidavits of members of the jury trying a cause will not be received to impeach or set aside their verdict.

In *Woodward* vs. *Leavitt*, 107 Mass. 453, Mr. Justice *Gray*, after a most exhaustive consideration of the question, announces, that the testimony of a juror may be received in explanation of facts and statements relied on to prove that he had formed and expressed an opinion before the trial; but that the testimony of one juror and that of his fellow jurors as to the part which he took in the discussions and votes of the jury is inadmissible and incompetent.

"The proper evidence of the decision of the jury is the verdict returned by them upon oath and affirmed in open Court; it is essential to the freedom and independence of their deliberations that their discussions in the jury-room should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment and uncertainty. Questions of the competency of such evidence have usually arisen upon its being offered with a view to overturn the verdict; for the party in whose favor the verdict has been rendered has ordinarily no need of further proof; but the decisive reasons for excluding the testimony of the jurors to the motives and influences which affected their deliberations are equally strong, whether the evidence is offered to impeach, or to support the verdict."

The *Supreme Court of Missouri*, in *State* vs. *Underwood*, 57 Mo. 52, say:

> "The rule is perfectly settled, that jurors speak through their verdict, and they cannot be allowed to violate the secrets of the jury-room and tell of any partiality or misconduct that transpired there, nor speak of the motives which induced or operated to produce the verdict."

In view, therefore, of the settled rule above indicated, I submit, that the evidence of the jurors was properly excluded.

But, in any event, the matter cannot be reviewed on error, because the questions were raised upon a motion for new trial, and in *Laber* vs. *Cooper*, 7 Wall. 571, it was held by this Court that the action of a trial Court upon a motion for a new trial cannot be made the subject of review.

I respectfully submit that the judgment ought to be affirmed.

Chester N. Krum

For Defendant in Error.

111-185

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JAMES H. McKENNEY, Clerk.

BURGOYNE (Law Tel. 587), 57, 59 & 61 Park St

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

JOSEPH ROSENTHAL,
Plaintiff in Error,

AGAINST

PRESTON PLAYER, Assignee,
Defendant in Error.

No. 276.

SUPPLEMENTAL POINTS FOR DEFENDANT IN ERROR.

The errors complained of by the Bill of Exceptions have been fully discussed by the principal brief for defendant in error.

A few further considerations have occurred to counsel, which it seems proper to submit to the Court, as well as a few other authorities in support of propositions already fully discussed.

I.

In respect of such errors as are assigned by the plaintiff in error, for matters relating to the pleadings before the trial commenced, we submit

FIRST, That the Court below was right in dismissing the first of defendant's exceptions.

Sufficient facts or conclusions of fact were alleged in the petition to remove the bar of § 5057 of the Revised Statutes.

The case of *Bailey vs. Glover* (21 Wall, 342), is authority for the proposition that in actions at law as well as in suits in equity, concealment of the cause of action by defendant, and discovery of the cause of action by the plaintiff within two years of commencing the action, are a sufficient replication to an answer setting up the bar of § 5057 of the Revised Statutes.

And the Court so holds not solely the statute applies equally, by its language, to suits at law and in equity, but because the weight of authority is in favor of the same doctrine at law as in equity.

Thus, the Court say:

"But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation."

The rule prevailing in Courts of Equity was stated by the Court in the following words:

"In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within the proper time after the discovery of the fraud.

"We also think that in suits in equity, the decided weight of authority is in favor of the proposition, that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

A distinction is clearly pointed out by the Court between cases, where there was simple *ignorance* of the facts on the part of the person who was wronged, and the case of *positive concealment* by the wrongdoer.

In the one case, the plaintiff must have shown himself without negligence or fault in not earlier discovering the cause of action; in other case, the assumption is that *no efforts whatever* were employed to discover the cause of action, but that on the contrary the plaintiff was lulled into inactivity by the fraudulent concealment of facts by the defendant.

In equity where the bill of complaint must, in order to disclose sufficient grounds of relief, set forth all the facts and circumstances, no practical question of pleading can arise, but in actions at law the distinction above pointed out acquires pracitcal significance in pleading.

In the case of *Bailey vs. Glover*, *supra*, there was no express allegation of "due diligence;" nor were any facts alleged from which diligence could be inferred. The bill showed concealment of, by defendant, and failure to discover by complainant, the cause of action until within two years of commencing the suit.

Counsel relies on the case of *Wood vs. Carpenter*, decided in this Court (101 U. S., 135) as establishing a different rule of pleading from that claimed by plaintiff to obtain in actions at law.

It is sufficient to say that that was an action arising under the statute of Indiana, and was decided on the authority of decisions of the court of last resort in that State.

It is true that decisions of this Court were also cited by the learned justice who wrote the opinion of the Court, but they were all cases in equity, where facts must be pleaded with greater particularity than in courts of law, and came before this Court after a hearing upon the merits.

Moreover, in the case of *Wood vs. Carpenter*, the complaint and reply, while disclosing in the judgments and conveyances of record the existence of *a means of information*, failed to allege that those means had been exhausted by the plaintiff before the bar of the statue attached.

The case was rightly decided, but is not an authority against tho decision of Judge BILLINGS in this case.

SECONDLY. Even if the petition were technically insufficient in its averments to remove the bar, the defendant lost his right to complain of the ruling of the Court by answering over to the merits.

This is the settled rule of this Court, and the decisions of the appellate courts of Louisiana have no weight as authority upon this question, as it is one of practice in this Court.

In the case of *Campbell vs. Wilcox* (10 Wall., 421), Mr. Justice FIELD says:

"The only question in this case arises upon the demurrer to the declaration. The action is upon four promissory notes of the defendant's, and the declaration contains the usual averments according to the established precedents in such cases, but does not aver that the notes were stamped as required by the Act of Congress, either at their date or at any subsequent time. The demurrer is general, that the declaration does not set forth facts sufficient in law to constitute a good cause of action, but the omission of an averment, in the particular mentioned, constitutes the special ground of objection presented in the brief of counsel. To the objection there are several answers. * * *

"In the third place, the filing of a plea to the merits after the demurrer was overruled, operated as a waiver of the demurrer. The pleading was then abandoned, and ceased thenceforth to be a part of the record."

In the case of *Young vs. Martin*, (8 Wall., 357), the Court say, per Mr. Justice FIELD:

"Had the demurrer been in the transcript, and it had appeared that the plaintiffs had relied upon its sufficiency, and final judgment thereon had passed against them, the error of the Court, if any existed, would have been open to examination, for it would have been disclosed by the proceedings. * * * But the demurrer is not in the transcript, and it is only a matter of conjecture whether it was a special or a general one; to the form or substance of the answer. * * * But independent of this consideration, the ruling of the Court on this point would not be noticed, for it appears that the plaintiffs, instead of relying upon the sufficiency of the alleged demurrer, filed a replication to the answer. They thus abandoned their demurrer, and it ceased to be a part of the record."

THIRDLY. The defendant was not prejudiced by the ruling.

Besides answering to the merits, he was permitted (though it seems to have been done *ex gratia*, and not of right, owing to the plain distinction between the statute of prescription in Lousiana, which may be pleaded at any time, and § 5057 of the R. S., which must be set up by answer, before trial) to interpose the plea of the statute at the trial, and a full determination of that issue, as well as the others raised by defendant's answer, was then had and resulted against the defendant.

Where the refusal of a Judge to pass upon an exception before going to trial has not injured the defendant, as where the exception was overruled, the defendant cannot complain.

Police Jury vs. Brookshier (31 La. An., 736).

FOURTHLY. The defect in the petition, if there was one, was cured by the verdict.

Where a complaint shows a substantial cause of action and judgment rendered on issue joined, irregularities in pleading are not available on error.

McElhaney vs. Gilleland (30 Ala., 183).
Way vs. Langley (15 Ohio St., 392).

A defect in a pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict if the issue joined be such as necessarily required, on the trial, proof of the facts defectively stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given, the verdict.

Dale vs. Dean (16 Conn., 579).
Nerot vs. Wallace (3 T. R., 25).

The rule is stated in *Stansbury vs. Nichols* (30 Tex., 145) to be that the verdict or decree cures all defects, imperfections or omissions in the relation or statement of the cause of action, in substance or form, if the issues be such as to require proofs of the facts imperfectly stated or omitted; but it will not cure or aid a statement of a defective title or cause of action.

II.

The plaintiff in error assigns as error the refusal of the Court below to exclude certain depositions offered by the plaintiff there, which depositions are a part of Bill of Exceptions No. 2, and will be found at page 29, *et seq.* of the record.

The statement of the Bill of Exceptions is that "the plaintiff offered in evidence the depositions of Louis Temme, John Benour, Carl Hirsch, Fred. Lipphardt and Amos M. Thayer, and the several documents annexed to said depositions, all of which are hereto annexed and made part of this bill of exceptions *to all of which counsel for defendant objected.*"

The defendant's objection is stated in these words:

> "That inasmuch as all of the depositions related only to the sale of the five hundred cases of boots and shoes alleged to have been made on 22d June, 1875, as appears by the inspection of said depositions, which by the above ruling of the Court (Order as to Exception, page 11 of record), had been dismissed as being improperly brought in plaintiff's action, said depositions were inadmissible and were irrelevant to the cause of action before the jury, and calculated to mislead them."

The defendant's objection is based on erroneous assumptions of both law and fact.

1. It is not true that "all of the depositions related only to the five hundred cases of boots and shoes."

The deposition of Carl Hirsch has apparently only to do with lye and soda, which for aught that appears in the Record, may be the same lye and soda which is the subject of the third count of the petition.

The deposition of Amos M. Thayer is equally foreign to the subject of transfer of boots and shoes *on the 22d June, 1875*, so far as an inspection of it shows. It may well be that it was relied on as proof of a reinvestment of interest in the debtor. The

record does not show. No presumption can be indulged except in favor of the ruling of the Court, in the absence of any part of the evidence taken at the trial.

The other depositions also contain evidence of other facts than the transfer of boots and shoes. In each of them there are facts testified to which, it is conceived, may well have been material upon some issue raised *by the other evidence* in the case, which is not included in the bill of exceptions.

2. The defendant also errs in his construction of the Court's Order as to Exception, found at page 11 of record.

The defendant's objection assumes that "the sale of the five hundred cases of boots and shoes, alleged to have been made on 22d June, 1875, * * * by the above ruling of the Court" was "dismissed as being improperly brought in plaintiff's action."

This is not the language nor effect of the Order as to Exception.

We may concede that so far as the plaintiff relied on the allegation of a sale on the 22d of June, 1875, as constituting in itself a *cause of action*, or even as constituting a *material allegation* of the cause of action set up in the second count of the petition, his claim was ruled upon adversely in the Order as to Exception.

The substantial purpose and effect of that order was an *amendment of the petition.*

In ascertaining the gist of the second count of the petition, it became necessary at the trial to read both the allegations contained in the petition and those supplied by the order of Court.

Together they constituted the cause of action declared on in the second count.

The substantial elements of that count then became

(*a*) The ownership by the debtor within three months before the filing of the petition in bankruptcy of an undivided one half interest in five hundred cases of boots and shoes.

(*b*) The transfer of *possession* of such boots and shoes to defendant.

(*c*) The sale and conversion of such boots and shoes by the defendant.

Thus, while the date, and even the fact of the transfer of the boots and shoes to defendant, *on the 22d day of June, 1875*, became unimportant, when considered in relation to the essential averments of the count, nevertheless they were entirely proper subjects of proof, as the starting points of a series of transactions, some of which were rightly complained of by plaintiff.

The depositions were, therefore, properly admitted to prove a fact which, while it was not material, was yet the proper subject of proof if followed by proof of other facts closely connected with it, and which were material.

The rule bearing on this subject is thus stated in Greenleaf on Evidence, § 51 *a*. "It is not necessary that the evidence should bear *directly* upon the issue. It is admissible if it *tends* to prove the issue, or constitutes a link in the chain of proof; although alone it might not justify a verdict in accordance with it.

Nor is it necessary that its relevancy should appear at the time when it is offered; it being the usual course to receive, at any proper or convenient stage of the trial, in the discretion of the judge, any evidence which the counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently connected with the issue, it is to be laid out of the case."

The order of admitting evidence is within the discretion of the presiding Judge; and if, in the exercise of this discretion, evidence is admitted which requires the introduction of further evidence to make it competent for the consideration of the jury, this is no ground for a new trial, unless it appears from the bill of exceptions *that such further evidence was not introduced.*

Proprietors, &c., vs. Prescott (4 Allen, 22.)

> Where evidence is admitted, which is competent when connected with other evidence, an exception to its admission cannot be sustained unless the bill or exceptions *affirmatively shows* that such other evidence *was not introduced*, or that the evidence admitted was improperly used for a purpose for which it was not competent.
>
> *Whiteker vs. McLaughlin* (115 Mass., 167.)

3. But the conclusive answer to the defendant's exception on this ground is found in the fact that the objection taken in the trial Court was taken *to the depositions as a whole.* The objection was too general and comprehensive to be sustained below or to be noticed in this Court.

Under the objection as it stands, the burden rests upon the defendant to show that *not a single fact* testified to *in any one of the depositions* was material under any aspect of the pleadings or proofs as they stood at the time the plaintiff offered the depositions.

The record does not show this, and unless it does, the exception must fail.

The record, so far from showing it, shows just the opposite state of facts. There are facts testified to in each of the depositions which are material, conceding the broadest construction of the Order as to Exception claimed for it by the defendant.

III.

Two questions arise upon the exceptions to the charge of the learned Judge in the Court below.

1. Was the question of "due diligence" one for the jury.
2. Do the facts presented by the bill of exceptions make out a case of negligence, or want of diligence, on the part of the assignee, as a matter of law.

FIRST. We submit that the first of these questions must be decided in the affirmative.

Even if the facts are undisputed, it is submitted that the *inferences* to be drawn from those facts are properly within the province of a jury.

SECONDLY. It is submitted that, in any case, the facts presented by the Bill of Exceptions do not show want of diligence as a matter of law, and that the defendant was not harmed by submitting the question to the jury.

(*a*) It does not appear from the testimony of the bankrupt contained in the record, that he refused to testify in regard to any of the sales or transfers, *which are the subject of this action;* nor indeed that he refused to testify in regard to any *sales or transfers* whatever.

On the contrary, for aught that the record shows, he testified fully on these subjects, and his testimony, so far from arousing suspicion, was calculated to lull it.

(*b*) It does not appear for what offense the bankrupt was indicted, nor what the questions were which he refused to answer.

It may well be that the indictment was for falsifying books or documents, or for spending property in gaming, or for failing to disclose fictitious debts proved against the estate; and that the questions which the bankrupt refused to answer were pertinent to these charges and to these only.

It could hardly be claimed with reason that the bankrupt's refusal to testify on these subjects could put the assignee upon inquiry as to the fraudulent transfers which are the subject of this action.

On the contrary, his refusal to testify as to one transaction for which he had been indicted was rather an indication that his previous testimony in regard to another transaction (for which he was also indictable) was true.

The two propositions urged by the learned counsel for the plaintiff in error on this subject, *assume* that the testimony of the bankrupt, and his refusal to testify, put the assignee upon inquiry as to the transactions which are the the subject of this suit; but no such assumption can be made.

It was a question for the jury whether the cause was sufficient to produce the effect in the mind of a reasonable man.

IV.

The judgment of the Court below should be affirmed, with costs.

EUGENE H. LEWIS,
Of Counsel for Defendant in Error.